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'HE INDIAN LAW REPORTS.

MADRAS SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT MADRAS AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

REPORTED BY

Council ... ... C. BOULNOIS, *Middle Temple.*
Court ... ... H. G. WEDDERBURN, *Inner Temple.*

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JUDGES OF THE HIGH COURT.

1st January—31st December 1885.

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,, J. Kernan (*Offg.*).

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THE

INDIAN LAW REPORTS.

Madras Series.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Brandt.

STRINIVASA (SECOND DEFENDANT), APPELLANT,

and

NÁRÁYANASÁMI (PLAINTIFF), RESPONDENT.*

1884.
September 18.

12 Mad. 253.

Rent Recovery Act, ss. 7, 9—Demand of pattá.

The Rent Recovery Act does not require that a tenant demanding a pattá shall apply in writing to the landholder specifying the lands and the fasli for which the pattá is required.

THE plaintiff, Náráyanasámi Náyakan, sued the defendant, Strinivasa Náyakan, under the Rent Recovery Act to compel him to grant a pattá for certain land.

A pattá had been applied for, but refused.

The suit was dismissed by the Deputy Collector of Salem, but on appeal the District Judge of Salem (E. N. Overbury) decreed in favor of plaintiff.

The defendant then appealed to the High Court on the ground, *inter alia*, that the plaintiff was not entitled to sue, because the demand for a pattá was not made in writing and accompanied by a draft muchalká.

Ramasámi Mudaliar for appellant.

Hon. *Rámá Ráu* and *Varada Ráu* for respondent.

The Court (Hutchins and Brandt, JJ.) delivered the following

JUDGMENT:—We consider that there is nothing in the Rent Recovery Act which requires that a tenant demanding a pattá shall

* Second Appeal 576 of 1884.

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SRINIVASA v. NÁRÁYANASÁMI.

make an application in writing accompanied by a statement showing the lands for which he requires a pattá and the fasli for which it is required. The case quoted—*Sayud Chanda Miah Sahib v. Laksmana Aiyangar*(1)—is no authority for the contention of the appellant's pleader. The learned Judges who decided that case seem to have admitted that section 7 did not govern section 9, and the decision really amounts to no more than this: that a demand made by a landlord for the exchange of pattá and muchalká must be accompanied by a copy of the pattá, or of something showing definitely all the terms offered or required. In the present case the landlord must have known very well for what lands a pattá was demanded and that the respondent only required that it should embody the same terms as that formerly granted to his vendor. Section 7 has no bearing on the case whatever. The Judge has found as a fact that the demand for a pattá was duly made at the time when the sale under the Act took place; the tenant for whose arrears the land had been attached had no saleable interest in the land, he having conveyed the same to the respondent; and the appellant had notice of that transfer before he proceeded to sell the supposed interest of the former tenant.

The only question for decision in this case was whether the respondent was entitled to the pattá claimed by him for fasli 1291, and we think the District Judge was right in holding that he was entitled to such pattá.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. September 5.

17 Mad. 227. 23 Mad. 619. 26 Do. 614 27 Do. 5.

THE COURT OF WARDS (PLAINTIFF), PETITIONER,

and

DARMALINGA (DEFENDANT), RESPONDENT.*

Rent Recovery Act, s. 7—Tender of pattá.

When a Collector in a suit brought under the provisions of the Rent Recovery Act has decided that a tenant is to accept a pattá on certain terms, the landholder

(1) I.L.R. 1 Mad., 45.

* Civil Revision Petition 172 of 1884.

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is not bound to tender such pattá for acceptance before suing to enforce the terms thereof.

COURT OF WARDS v. DARMALINGA.

THIS was a suit brought by the Court of Wards on the Small Cause side of the Subordinate Judge's Court at Tanjore to recover rent due for fasli 1290 (1880-81) from the defendant, a raiyat of the Gandrakottai zamíndárí.

The defendant having refused to accept a pattá and execute a muchalká for fasli 1290, proceedings were taken against him in the Revenue Court, which decided that he should accept a pattá as settled by that Court.

The defendant pleaded that no pattá had been tendered.

The Subordinate Judge (T. Ganapati Ayyar) held that, as there had been no actual tender of a pattá, the plaintiff could not recover.

The plaintiff then applied to the High Court under section 622 of the Code of Civil Procedure to set aside this decree.

Mr. *Shephard* for petitioner.

Respondent was not represented.

The Court (Turner, C.J., and Muttusámi Ayyar, J.) delivered the following

JUDGMENT:—The judgment of the Collector amending the pattá and informing the defendant of the terms on which he is to execute a muchalká constitutes a sufficient tender to entitle the landlord to enforce the terms of the pattá.

The law nowhere imposes on the landlord the obligation to make a tender after judgment, on the other hand it does declare the tenant liable to ouster if he fails to execute a muchalká within ten days from the date of the Collector's decision. The decree is set aside, and the Subordinate Judge is directed to pass a fresh decree.

The costs of this application will abide and follow the result.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. October 3.

VENKATRAMAYA (PLAINTIFF), PETITIONER,

and

VIRAYA (DEFENDANT), RESPONDENT.*

Small Cause Court—Jurisdiction—Water-cess—Payment by landholder—Implied contract by tenant to recoup.

If a landholder pays to Government water-cess which his tenant is legally bound to pay, a Small Cause Court constituted under Act XI of 1865 has jurisdiction to decide a suit brought by the landholder against the tenant to recover the amount so paid by the landholder.

THIS was an application to the High Court under section 622 of the Code of Civil Procedure to set aside the decree of N. Raghavulu Náyudu, District Múnsif of Bezvada, in Small Cause suit No. 701 of 1883.

The plaintiff, Rájá Venkatramaya Appa Ráu, a zamindár, sued his tenant, Avatapalli Viraya, to recover Rs. 20-5-2, alleging that the Collector had levied water-tax from him and that defendant was bound to contribute his share of the tax.

The Múnsif held that plaintiff had no cause of action, as defendant had not cultivated his land during the period for which tax was paid.

Sádagopácháryar for petitioner.

Respondent was not represented.

It was contended for the plaintiff that there was an implied contract by the defendant to recoup the plaintiff for the payment of tax made on his behalf, and that such suit was cognizable by a Small Cause Court.

The judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.) was delivered by

TURNER, C.J.—Where water-cess is due, it may be recovered in the same manner as Government revenue, *i.e.*, the land may be

* Civil Revision Petition 273 of 1884.

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VENKAT-RAMAYA v. VIRAYA.

sold and the rights of all parties other than the Government destroyed. The landowner is therefore entitled to pay such cesses whether a personal liability for them has been contracted by his tenants or by himself, and if his tenants are liable to pay the cess, he is entitled to claim from them reimbursement in virtue of what is known as an implied contract. If the claim cannot be described as one founded on contract, it can be described as arising out of a right to compensation; in other words, it would be a claim for damages.

The suit is cognizable on the Small Cause Court side of the Múnsif's Court, and the Múnsif should have determined whether or not the tenant was legally bound to pay in whole or in part the amount claimed and have passed a decree in accordance with his finding. The decree of the Múnsif is set aside and a new trial ordered. The costs of this application will abide and follow the result.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar.

QUEEN-EMPRESS

against

RAMAKKA.*

1884. September 22. October 11.

32 Cal. 292. 9 C.W.N. 547.

Penal Code, s. 309—*Attempt to commit suicide*—*Intention*—Locus pœnitentiæ.

R, with the intention of committing suicide by throwing herself into a well, ran to the well, where she was arrested. She was convicted under section 309 of the Indian Penal Code of having attempted to commit suicide:

Held, that the conviction was illegal.

THIS was a case submitted for the orders of the High Court by W. A. Happell, District Magistrate of Kistna.

The facts appear from the judgment of the High Court (Muttusámi Ayyar, J.)

Counsel were not instructed.

JUDGMENT.—The accused quarrelled with her father and brother and ran to a well saying that she would fall into it. The

* Criminal Revision Case 539 of 1884.

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QUEEN EMPRESS v. RAMAKKA.

first witness for the prosecution, who was at the well, heard the alarm raised by the second witness, caught the accused, and delivered her into the custody of the Village Múnsif. Upon these facts, the Second-class Magistrate of Palnád (V. Subramaniam) convicted her of an attempt to commit suicide and sentenced her to four months' simple imprisonment. There is no doubt that the accused intended to commit suicide and that she prepared to carry out that intention and proceeded to the well. She might have, however, still changed her mind, and she was caught before she did anything which might be regarded as the commencement of the offence of which she is convicted. I set aside the conviction and direct that the accused be discharged from custody.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Kernan.

1884. October 9.

PALANI (DEFENDANT), APPELLANT,

and

SIVALINGA (PLAINTIFF), RESPONDENT.*

Rent Recovery Act, s. 33—Sale—Adjournment for want of bidders to next day, invalid—Duty of officer conducting sale.

A sale of land for arrears of rent under the provisions of the Rent Recovery Act having been advertised for a certain day, was, owing to the absence of bidders on that day, adjourned and held on the day following by the officer empowered to sell.

Held, that the sale was invalid.

THIS was an appeal from the decree of E. N. Overbury, District Judge of Salem, reversing the decree of V. Vaithi Ayyar, District Múnsif of Námakál, in suit 212 of 1882.

The plaintiff, Sivalinga Goundan, sued the defendant, Pallikudathu Palani Goundan, to recover possession of certain land which he alleged he had purchased at an auction sale held under the provisions of the Rent Recovery Act (Madras Act VIII of 1865) on the 16th November 1880.

* Second Appeal 596 of 1884.

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The Múnsif dismissed the suit on the ground that the date fixed for the sale under section 33 of the Rent Recovery Act was the 15th, not the 16th of November.

On appeal the District Judge found that the property was advertised for sale on the 15th, but, as there were no bidders on that day, the sale was held on the 16th November; held that section 33 of the Act did not require fresh notice to be issued under the circumstances, and decreed for plaintiff.

Defendant appealed.

Bháshyam Ayyangár for appellant.

Rámásámi Mudaliar for respondent.

The Court (Turner, C.J., and Kernan, J.) delivered the following

JUDGMENT:—The officer deputed to hold the sale reported that on the date of the sale the tom-tom was beaten, but that no persons collected to enable him to put up the property for sale. He therefore adjourned the sale to the following day.

Although the officer deputed to make a sale under the Civil Procedure Code has power to adjourn a sale, there is no power to do so given to the officer making a sale under the Rent Act. We need not now consider whether, if a sale of several lots was commenced on the appointed day and for want of time could not be concluded on that day, the officer might not be competent to continue the sale on the following day. But, whereas in this instance no persons attended, it was the duty of the officer to report to the Court the failure to sell, and a fresh order might have been issued with a new proclamation. The sale must be set aside and the decree of the Appellate Court reversed and that of the Múnsif restored, but, as the appellant took no steps to set aside the sale, without costs.

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APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

1884. October 16.

11 Mad. 130.

KAHÁNARÁMÁ (DECREE-HOLDER), APPELLANT,

and

RANGA (JUDGMENT-DEBTOR), RESPONDENT.*

Act XI of 1865, s. 20—Civil Procedure Code, s. 223—Small cause decree of Subordinate Judge—Execution against immovable property—Co-ordinate jurisdiction of Subordinate Judge and District Múnsif—Execution by District Múnsif.

The Court of a Subordinate Judge and that of a District Múnsif had jurisdiction over certain immovable property.

A small cause decree of the former Court having been sent by the Subordinate Judge to the Court of the District Múnsif for execution against the said property under the provisions of section 20 of Act XI of 1865, the application for execution was rejected by the Múnsif on the ground that this procedure was illegal.

Held, that section 20 of Act XI of 1865 was not modified by section 223 of the Code of Civil Procedure, and that the Múnsif's Court was, therefore, bound to execute the decree.

THIS was a case stated under section 617 of the Code of Civil Procedure by M. Cross, Subordinate Judge of Kumbakonam.

On the application of Kahánarámá Bhagavathar, decree-holder in Small Cause suit 53 of 1882 in the Subordinate Court, the decree was sent under section 20 of Act XI of 1865 to the District Múnsif's Court at Valangimán, for execution against the immovable property of the judgment-debtor, Ranga Solagan.

The District Múnsif rejected the application for execution on the ground that, the Subordinate Court itself having jurisdiction over the immovable property against which the decree was to be executed, the decree could not be transferred to the Múnsif's Court for execution.

The question whether the procedure of the Subordinate Court, which had been followed since 1862, was correct, was submitted to the High Court for decision.

Counsel were not instructed.

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* Referred Case 12 of 1884.

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The judgment of the Court (Mut
JJ.) was delivered by

MUTTUSÁMI AYYAR, J.—Under sec
any Court having general jurisdiction
immovable property is situated is b
Although the Small Cause Judge has in
the general jurisdiction of a Subordina
been repealed, and the power confer
Múnsif having general jurisdiction ha
Gopal v. *Nanku*(1) it was only held t
having general jurisdiction was entitl
as a Small Cause Judge under section
a special enactment, we are not prepar
by section 223 of the Civil Procedure

The language of section 20 doe
which the Small Cause Judge has no
may be cases in which the decree-ho
venient to execute the decree agains
Múnsif's Court than in the Subordinat
that the District Múnsif is bound to p
the decree as directed by section 20 of

APPELLATE

Before Sir Charles A. Turner,
Mr. Justice K

SUBBA (PLAINTIFF)

and

VENKATA (DEFENDANT

Rent Recovery Act, ss. 1, 2—*Le*

V leased certain fields to S at a single rent.
V under a raiyatwári pattá, but the pattá fo
vendors. V distrained for arrears of rent unde
Act :

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(1) I.L.R., 1 All., 624.   * S

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SUBBA v. VENKATA.

Held, that V was not a landholder within the definition in the said Act in respect of the latter fields, and, therefore, that the distraint was illegal.

THE plaintiff, Subbayyar, sued the defendant, Yellari Venkatarayar, for Rs. 1,027-2-8, damages caused by an alleged illegal distraint under the Rent Recovery Act (Madras Act VIII of 1865).

The Subordinate Judge of Cuddalore (Ádiappa Chettiar), to whose Court the case had been transferred from that of the District Múnsif of Chidambaram, held that the distraint was illegal and gave the plaintiff a decree for Rs. 261-1-0.

On appeal, the District Judge of South Arcot (J. Hope) reversed this decree and dismissed the suit.

The plaintiff appealed to the High Court.

Báláji Ráu for appellant.

Gopáláchâryar for respondent.

The facts necessary for the purpose of this report appear from the judgment of the Court (Turner, C.J, and Kernan, J.) which was delivered by

TURNER, C.J.—This suit was brought to recover damages for a distraint for arrears of rent, which the plaintiff asserts was illegal. It appears that he held 65 kánís of land under the defendant at a single rent of 850 kalams of paddy and 300 bundles of straw, and that he had executed a muchalká. The defendant held 57 kánís out of the land leased under a raiyatwárí pattá, as to the residue of the land the pattá stood in the name of the defendant's vendors; but the defendant had paid revenue due in respect of one plot of this land from 1873 and that due in respect of another plot from 1876.

On the part of the plaintiff, it is contended that, in respect of the land in excess of 57 kánís, the defendant was not a *landholder* within the definition of that term in the Rent Act, and that inasmuch as the whole 65 kánís were held on a single rent, the defendant was not at liberty to distrain. We are obliged to hold that the objection is well founded.

When the rent is payable in one sum in respect of land of which the landlord is the registered owner, or otherwise subject to the payment of revenue direct to Government, as well as of land in respect of which he has no such direct liability, we cannot allocate the rent and say that the distraint was good in respect of so much of the balance due and that it was illegal and

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unauthorized in respect of the residue. The decree of the Lower Appellate Court must be set aside and that of the Court of First Instance restored with costs in all Courts.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

REFERENCE UNDER STAMP ACT, SECTION 46.*

1884. October 7.

Stamp Act, ss. 61, 64—Receipt—Acknowledgment by letter.

Where the receipt of money exceeding twenty rupees, in satisfaction of a debt, is acknowledged by letter without a receipt stamp being affixed, the writer is liable to punishment under section 61 of the Indian Stamp Act, 1879.

THIS was a case referred, for the decision of the High Court, by the Board of Revenue under section 46 of the Indian Stamp Act, 1879. The circumstances which led to this reference were as follows:—

In calendar case 21 of 1884 on the file of the Deputy Magistrate of Salem, Viramuttu Padiáchi, mittadár of Chekkadipatti, was tried for an offence against the Stamp Law in having written and sent, without affixing thereto a receipt stamp, the following letter:—

"I am doing well through your wishes, and request that you will kindly communicate about your welfare. I received through your peon, Padsha, son of Karutha Routhen, Rs. 100, being the balance left after payment of Rs. 100 made by you out of the sale-value of my pony sold to you for Rs. 200. I also learnt that you want the saddle and bridle, &c. If you want them, come over immediately and take them. Their value is Rs. 50. Please write to me for any other thing that you may want me to do for you."

The Deputy Magistrate being of opinion that the mention of a receipt of money in a letter could not make the letter liable to stamp duty, discharged the accused.

On the 12th of August 1884, this case was referred, under section 438 of the Code of Criminal Procedure, for the orders of the

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* Referred Case 7 of 1884.

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REFERENCE UNDER STAMP ACT, s. 46.

High Court by C. W. W. Martin, Acting District Magistrate of Salem, on the ground that the order was illegal.

On the 19th of August the case was disposed of by Hutchins, J., who delivered the following

"JUDGMENT:—The neglect to give a stamped receipt is dealt with by a special section of the Stamp Act, viz., the 64th. It is only punishable if there has been a demand under section 58, or if the sum is fraudulently understated. There is no ground for this Court to interfere."

On the 30th August the Collector of Salem (G. McWatters), being of opinion that this judgment conflicted with a ruling of the Board of Revenue, dated 13th November 1883, brought the matter to the notice of the Board of Revenue.

On the 20th September, the Board of Revenue passed the following Resolution:—

"This decision of the Honorable Mr. Justice Hutchins is opposed to the opinion of the Board and to the instructions which they have issued to Collectors. The Board, therefore, under section 46 of Act I of 1879, resolve to state this case for the opinion of the High Court, in order that it may be decided by a Full Bench.

"Any person who writes a receipt for a sum exceeding Rs. 20, without affixing a stamp, commits an offence under section 61 of the Stamp Act, for the receipt is an instrument chargeable with duty (*vide* section 3 (17) and schedule 1, art. 52), and until a one-anna stamp is affixed the instrument is not duly stamped.

"It is true that there are other offences connected with receipts. Section 58 directs that a person receiving more than Rs. 20 shall, on demand, give a duly stamped receipt, and section 64 provides a penalty for the refusal to give a receipt and for fraudulent under-statement of the amount; but these special offences created by sections 58 and 64 in no way alter the fact that an unstamped receipt is an instrument chargeable with duty and not duly stamped within the meaning of section 61.

"A parallel may be found in regard to insurances. Sections 65 and 66 create special offences in respect of insurance policies, but if a Collector ordered a prosecution under section 61 in the case of an insurance policy not duly stamped, it would be no defence to urge that the offences contemplated by sections 65 and 66 had not been committed.

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"The Board, therefore, are of opinion that, whether or not a demand was made, a receipt for more than Rs. 20 is an instrument chargeable with duty of one anna, and, if such receipt is not duly stamped, the person executing it is liable to a penalty under section 61.

REFERENCE UNDER STAMP ACT, s. 46.

"The acting Third Member of the Board is not a party to these proceedings, and has recorded a minute of dissent to the effect that a receipt defined in section 3 (17) of the Act becomes such for the penal purposes of the Act, only when it is given in answer to the demand made under section 58."

The Government Pleader (Mr. *Shephard*) appeared on behalf of the Board of Revenue.

The judgment of the Full Bench (Turner, C.J., Kernan, Muttusámi Ayyar, Hutchins, and Brandt, JJ.) was delivered by

TURNER, C.J.—Assuming that this is a matter in which a reference may be made, we reply that the accused could not be convicted under section 64 of the Act, for no one of the offences constituted by that section were committed by him. He did not refuse nor neglect to give a receipt, nor did he with intent to defraud the revenue give a receipt for less than Rs. 20 when he had received more, nor did he with the like intent separate or divide the money or property paid or delivered.

But the accused was liable to conviction under section 61, for the letter was a receipt and as such chargeable with duty, and the accused signed it otherwise than as a witness without its being properly stamped.

HUTCHINS, J.—I only wish to add that, although I have now no doubt that my reason for declining to interfere on the Criminal Reference was wrong, I am equally sure that it was not a case in which this Court ought to have interfered to the prejudice of the accused by ordering a new trial. If I had been overruling any judicial order, I should have given the point now referred to us better consideration, but being satisfied that I ought not to interfere I disposed of the matter somewhat hastily.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

1884. October 7.

IN THE MATTER OF THE PETITION OF PARTHASÁRADI.*

9 C. C. J. 621.
36 C. C. 645.

Stamp Act, sch. I, art. 27; sch. II, art. 11(a)—*Vakíl—Entry on roll of advocates—Exemption from duty.*

By article 11 (*a*) of schedule II of the Indian Stamp Act, 1879, (which exempts from duty the entry of an advocate, vakíl or attorney on the roll of any High Court when he has previously been enrolled in a High Court established by royal charter), a vakíl on the roll of the High Court, Madras, who applies to be entered on the roll of advocates, is exempted from the duty prescribed by article 27 of schedule I of the said Act.

ON the 6th of October, Mr. *Grant* moved before the Appellate Court (Turner, C.J., and Brandt, J.) that M. O. Parthasáradi Ayyangár be entered on the roll of advocates of the High Court.

The petitioner claimed exemption from stamp duty, leviable under article 27, schedule I, of the Indian Stamp Act, 1879, by virtue of article 11(*a*), schedule II, inasmuch as he had already, in April 1880, been enrolled as a vakíl of the High Court and his name was still upon the roll of vakíls.

The question—Whether the petitioner was liable to duty on enrolment as an advocate—was referred to a Full Bench.

Mr. *Grant* for petitioner.—The stamp fee under the Stamp Act, 1879, for entry on the rolls, whether as advocate, vakíl or attorney, is Rs. 500. (The attorney pays Rs. 250 on his articles of clerkship and Rs. 250 on enrolment.) When once the name of a person appears on the roll, he cannot be required to pay a fee for entry either in the High Court in which he is enrolled or in any other Court, whether he desires to be enrolled in the same or any other character than that in which he has been enrolled. A second entry fee could be claimed only if the words "as such" had been introduced after the word "enrolled" in the exemption clause (article

* C.M.P., 509 of 1884.

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11(*a*), schedule II, of the Stamp Act). The petitioner has fully satisfied the language of the clause, as it stands, to entitle him to the exemption. *In re* PARTHA-SÁRADI.

The judgment of the Full Bench (Turner, C.J., Kernan, Muttusámi Ayyar, Hutchins, and Brandt, JJ.) was delivered by

TURNER, C.J.—In our judgment the petitioner is within the terms of the exemption. He has been already enrolled in a High Court and he has paid Rs. 500 for entry on the roll. The tax is one which is peculiar to the profession of the law, and it may be that the legislature considered it sufficient to demand from a member of the profession the payment of a single fee, whether such member was first enrolled as an attorney, or as a vakíl, and then proceeded to qualify as an advocate.

However this may be, we are bound to give effect to the terms of the exemption, unless it can be collected from the context that they are intended to bear a sense other than their ordinary sense; and here no such inference can be so collected.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Brandt.

REFERENCE UNDER STAMP ACT, SECTION 46.*

1884. September 23.

Stamp Act, s. 4(c), *sch. I, art.* 5—*Court Fees Act, sch. II, art.* 1(b)—*Petition to withdraw suit—Agreement—Bond.*

A petition, stamped as an agreement, having been presented to a District Court by the parties to a suit, informing the Court that they had entered into an agreement, whereby, *inter alia*, the defendant was bound to deliver to the plaintiff certain wood, and requesting that the suit might be removed from the file, the District Judge impounded it, levied a sum for insufficient stamp duty and a penalty, on the ground that it was a bond, and forwarded it to the Collector.

Upon a reference made by the Board of Revenue at the instance of the Collector:

Held, that the duty leviable was a Court fee stamp under article 1(*b*) of sch. II of the *Court Fees Act*, 1870.

THIS was a case stated by the Board of Revenue under section 46 of the Indian Stamp Act, 1879.

* Referred Case 4 of 1884.

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REFERENCE UNDER STAMP ACT, s. 46.

The facts are set out in the following letter from the Collector of Chingleput (J. F. Price) to the Board of Revenue, dated 18th April 1884:—

"I have the honor to submit a translation of document, a copy of which was sent to me, under section 35 of the Stamp Act, by the District Judge, as I consider that stamp duty and penalty have been improperly levied upon it.

"I cannot make this reference under section 45 of the Stamp Act, but section 46 provides that the Board of Revenue can refer any case coming to its notice in any way soever to the High Court. This, I consider, warrants my bringing this one forward. The document is clearly a razináma, or deed setting forth that the parties have compromised and that the plaintiff withdraws. In it, it is stated, that the defendant having agreed to deliver certain wood within a certain time, in accordance with an agreement made, and to receive Rs. 60, the parties have settled matters and request the dismissal of the suit.

"The District Judge impounded this document, which bore a stamp of As. 8, and levied Rs. 1-8-0 as deficient stamp duty and Rs. 15 as penalty.

"On my asking him the ground for this, he replied that the document is a bond, inasmuch as it is an agreement to deliver '40 tons of casuarina wood, being agricultural produce.' But this does not seem to be the case, for there was evidently another prior agreement and the document says, that, as there has been an agreement made to a certain effect, the suit should be dismissed; and the paper is signed by both parties. Further, if the document was one binding the defendant to deliver 40 tons of casuarina wood, I do not think that this would be 'agricultural produce' within the meaning of the Stamp Act. One would hardly call teak logs from the Nilambúr plantations 'agricultural produce,' and if one would not, why should casuarina logs be included under that head?

"It appears to me that the instrument under reference is merely an agreement and nothing more. There are hundreds of these filed every year in Civil Courts, and they all, as far as I know, bear an eight-anna stamp. If the learned Judge's view is correct, the majority of these, where they contain any mention of the agreement upon which a compromise is based, are incorrectly stamped. It seems to me, therefore, desirable, both in the interests

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of the public and those of the stamp revenue, that an authoritative decision should be obtained as to what they should be considered." REFERENCE UNDER STAMP ACT, s. 46.

The resolution of the Board of Revenue, dated 10th May 1884, was as follow :—

" The Board do not consider that timber is agricultural produce within the meaning of section 3, clause 4(*c*), Act 1 of 1879. The District Judge of Chingleput appears to have held that the firewood mentioned in the document was agricultural produce because it was the produce of casuarina plantations, but there is nothing in the document about casuarina wood, and the terms of the document would be satisfied if defendant delivered junglewood.

" Moreover, the Board consider that the document is an agreement and not a bond obliging the defendant to deliver the wood. As the District Judge, however, has taken a different view, and as the question is one of general importance, it will be referred to the High Court."

Counsel were not instructed.

The judgment of the Full Bench (Turner, C.J., Kernan and Brandt, JJ.) was delivered by

TURNER, C.J.—The document is a petition to the Court, informing the Court of an agreement into which the parties have entered for the compromise of the suit, and praying for the removal of the suit from the file. As such, it is a petition to the Court chargeable with a stamp under the Court Fees Act, schedule II, article 1(*b*).

The sums improperly levied by the Judge should be returned.

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APPELLATE CRIMINAL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

1884. October 3, 18.

12 Cal. 473.

IN THE MATTER OF THE PETITION OF PADMANABHA.*

Criminal Procedure Code, ss. 17, 435, 437—*District Magistrate—Power to revise proceedings of Sub-Divisional Magistrate of the first class—"Inferior," "Subordinate" Magistrates—Reason of distinction.*

Under section 435 of the Code of Criminal Procedure, a District Magistrate has power to call for, and examine, the record of a proceeding before a Sub-Divisional Magistrate of the first class.

Nobin Kristo Mookerjee v. *Russick Lall Laha* (I.L.R. 10 Cal., 268) dissented from.

AN application under section 435 of the Code of Criminal Procedure having been made to District Magistrate of Nellore (J. Grose) by one Nidamanuri Padmanabha Setti to call for, and examine, the record of a case in which a complaint of cheating had been dismissed by the Naidupet Sub-Divisional Magistrate of the first class, the District Magistrate rejected it on the ground that he had no jurisdiction, following the decision of the High Court at Calcutta in *Nobin Kristo Mookerjee* v. *Russick Lall Laha.*(1)

The records of the case were called for by the High Court, and the case was referred to a Full Bench by Turner, C.J., and Muttusámi Ayyar, J., on the 3rd of October.

Counsel were not instructed.

The judgment of the Full Bench (Turner, C.J., Muttusámi Ayyar, Hutchins and Brandt, JJ.) was delivered by

TURNER, C.J.—An application was made to the Magistrate of the District to call for, and examine, the record of a case in which a complaint of the offence of cheating, punishable under section 417 of the Indian Penal Code, had been dismissed by a First-class Magistrate under section 203 of the Code of Criminal Procedure. The Magistrate of the District entertaining some doubt as to his power in consequence of the decision of the High Court, Calcutta, in *Nobin Kristo Mookerjee* v. *Russick Lall Laha*,(1) applied to this Court for instructions. As the Court does not give extra-judicial opinions on questions so submitted, he was directed to pass orders

* Criminal Revision Case 574 of 1884.

(1) I.L.R. 10 Cal., 268.

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In re PADMANABHA.

and submit his proceedings for revision, that the point might be duly determined.

We have considered the decision to which our attention has been called, and, with the highest respect for the learned Judges by whom it was passed, we feel constrained to a conclusion different from that at which they have arrived.

It appears to us that the group of sections 435 to 439 of the Code of Criminal Procedure must be read together. Section 435 empowers the Courts therein named to call for the proceedings of any inferior Criminal Court within the local limits of their jurisdiction, and goes on to declare what course is to be pursued by one of the Courts to whom the power is given, the Court of the Sub-Divisional Magistrate, when the Court conceives that further action is necessary. The following sections indicate what course is to be taken by the Courts superior to that of the Sub-Divisional Magistrate :—Under section 437 the District Magistrate may direct any subordinate Magistrate to make further inquiry into any complaint which has been dismissed under section 203, &c. This power, it is obvious from the first words of the section, the Magistrate of the District may use on examining any record under section 435. Hence we see that the term "subordinate" is comprised in the term "inferior" used in section 435. The reason for the employment of the latter term in sections 435 and 436 was that in both those sections the Court of Session and the District Magistrate are combined, and the Magistrates (other than the District Magistrate) though subordinate to the District Magistrate are not so generally to the Court of Session. It was necessary, therefore, in sections 435 and 436 to employ a term applicable to the relations of the magistracy both to the supervising authority and the appellate tribunal.

When we come to section 437, in which the District Magistrate is dealt with separately from the Court of Session, the use of the term "inferior" is no longer necessary and accordingly we find the term used is "subordinate." Reading sections 435 and 437 with section 17, we hold that the District Magistrate had jurisdiction to entertain the application, and, setting aside his order, we direct him to restore the application to the file and dispose of it on the merits.

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14 C.L.J. 228
39 Cal 104
16 Cwn 402

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884. November 7.

KRISHNASÁMI (PLAINTIFF), PETITIONER,

and

G. A. ENGEL (DEFENDANT), RESPONDENT.*

Civil Procedure Code, ss. 483, 484, 648—*Attachment before judgment—Property not in jurisdiction.*

Under the provisions of sections 483 and 484 of the Code of Civil Procedure, 1882, property of the defendant, which is not within the jurisdiction of the Court, cannot be attached before judgment.

THIS was a petition to the High Court, under section 622 of the Code of Civil Procedure, to set aside an order of J. W. Handley, Chief Judge of the Presidency Small Cause Court, rejecting an application made by the plaintiffs, Krishnasámi Chetti and others, in suit 19216 of 1884, to attach before judgment a sum of money belonging to the defendant in the said suit in the hands of the Chief Engineer of the Madras Railway at Bellary. The Chief Judge in rejecting the application stated that it had been ruled by the Full Court that the Court had no jurisdiction to attach before judgment, under sections 483, 484 and 648, property out of the jurisdiction of the Court.

Laing for petitioner.

Respondent was not represented.

The judgment of the Court (Turner, C.J., and Hutchins, J.) was delivered by

TURNER, C.J.—We agree with the learned Judges of the Presidency Small Cause Court that sections 483 and 484 warrant the attachment before judgment only of property within the jurisdiction of the court. The plaintiff, it is provided, may apply to the Court to direct that any portion of the property of the defendant *within the jurisdiction of the Court* shall be attached. This limitation of the application governs the proceedings which follow it and regulates the power of the Court. The words "within the jurisdiction

* Civil Revision Petition 385 of 1884.

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of the Court" were introduced into the Code for the first time by the Act of 1879, and appear to embody the result of rulings which had been passed before section 648 was a part of the Code.

The section 648 does not authorize the Court to attach any property which it is not authorized to attach by any other sections of the Code, though it permits it to transmit its order where such an order may be made for execution beyond the local limits of its jurisdiction. The words are "where any Court desires . . . that any property shall be attached under any provision of this Code."

There are sections of the Code other than sections 483 and 484, which authorize the attachment of property without qualification as to its location, and when it has made orders under these sections, the Court can avail itself of the powers given by section 648, namely, as has been pointed out by the learned Second Judge, section 168 of the Code in the case of all Courts, and in the case of Courts other than Small Cause Courts, section 493.

We affirm the order of the Small Cause Court and reject the petition.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

1884. October 16.

23 Cal. 179. 26 All. 517.

SUBBA (JUDGMENT-CREDITOR), APPELLANT,

and

VENKATA (JUDGMENT-DEBTOR), RESPONDENT.*

Civil Procedure Code, s. 341—Decree—Execution—Arrest—Non-payment of subsistence-money—Discharge—Re-arrest.

The discharge of a judgment-debtor before imprisonment on account of the non-payment of the subsistence-money for the debtor is no bar to the debtor being re-arrested.

THIS was an appeal against an order of E. N. Overbury, District Judge of Salem, confirming an order of P. A. Lakshmana Chetti, District Múnsif of Hosúr, dismissing an application made by Kotha Subba Chetti, judgment-creditor, for execution of the décree in suit No. 18 of 1875 by arrest of the person of the debtor, Namala Venkatarámana Ayyan.

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* Appeal against appellate order, No. 29 of 1884.

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SUBBA v. VENKATA.

The application was opposed on the ground, *inter alia*, that it was barred, inasmuch as the debtor had been arrested on a former occasion and discharged from custody because the creditor had not deposited subsistence-money.

The District Judge held that the creditor had, by his conduct, waived his remedy against the person of the debtor.

Rámásámi Mudaliar for appellant.

Respondent was not represented.

The judgment of the Court (Muttusámi Ayyar and Brandt, JJ.) was delivered by

MUTTUSÁMI AYYAR, J.—The respondent was discharged after arrest on the ground that no subsistence-money was deposited by the appellant. It does not appear that he was discharged from jail. It is only when he has been imprisoned in, and discharged from, jail that he cannot be re-arrested under the decree, in execution of which he was once imprisoned.

We set aside the order of the Lower Courts. We shall make no order as to costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

1884. October 16. November 6.

KAMARÁJÁ (APPELLANT),

and

THE SECRETARY OF STATE FOR INDIA (RESPONDENT).*

Madras Forest Act, s. 10—Appeal to the District Court—Court Fees Act, sch. II, art. 11(a), art. 17, cl. VI.

An appeal to the District Court from the rejection of a claim by a Forest Settlement officer under cl. II of s. 10 of the Madras Forest Act, 1882, falls under art. 17, cl., VI, and not under art. 11 (a), of sch. II of the Court Fees Act, 1870.

THIS was a case referred, for the decision of the High Court, under section 617 of the Code of Civil Procedure by the District Judge of Madura (E. Turner).

The case was stated as follows:—

"Mr. Pole, counsel on behalf of the appellant, presents this appeal against the decision of F. E. Robinson, Forest Settlement

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* Referred case 10 of 1884.

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officer, under Act V of 1882, and pays Court fee of As. 8 for the appeal, urging that no provision has been made about Court fees either in the Court Fees Act VII of 1870, or Madras Forest Act V of 1882.

"This is an appeal preferred to this Court in respect of a rejected claim under cl. II, s. 10 of Madras Forest Act V of 1882. No provision was made in the Court Fees Act, 1870, about Court fees payable on such appeals, as the Forest Act came into force long after it. The appeal involves a claim to an intended reserve under the Forest Act and it is not possible to estimate the subject-matter at a money-value. I am, therefore, of opinion that the Court fee payable on this appeal is Rs. 10 as provided for in art. 17 (VI) of sch. II, Court Fees Act, 1870.

"Under these circumstances, the question I propose to submit for the opinion of their Lordships is—Whether Court fee payable on this appeal is Rs. 10 or As. 8?

"The question is an important one, because similar questions may arise. The appellant's counsel also wished that I should refer the question."

Mr. *Grant* for appellant.

Respondent was not represented.

The judgment of the Court (Muttusámi Ayyar and Brandt, JJ.) was delivered by

BRANDT, J.—A notification having been published by Government under section 4 of the Forest Act (Madras Act V of 1882), declaring that it is proposed to constitute certain land a reserved forest, the zamíndár of Bodinayakanúr put in a claim before the Forest Settlement officer to the Thambiran forest, included in or constituting such proposed reserved forest.

The claim was wholly rejected, and the zamíndár preferred an appeal to the District Court in respect of the rejection of his claim.

The appeal was presented with an eight-anna Court fee stamp affixed thereto.

The District Judge refers to this court the question—What is the Court fee stamp leviable on such an appeal? expressing an opinion that the Court fee payable is Rs. 10, as provided in sch. II, art. 17, cl. VI, as on an appeal in a suit where it is not possible to estimate at a money-value the subject-matter of the suit, and not otherwise provided for in the Act.

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KAMARÁJÁ v. SECRETARY OF STATE FOR INDIA.

It is contended before us that the memorandum of appeal is correctly stamped, having regard to art. 11, sch. II, of the Court Fees Act; this being an appeal not from an order rejecting a plaint or from a decree or from an order having the force of a decree.

We think that the decision of the Forest Settlement officer upon the claim must be regarded as a decision in proceedings in the nature of a suit. The jurisdiction of the civil Courts is entirely excluded between the dates of the publication of the notification under section 4 and of the notification declaring the forest to be reserved, except as specially provided, and the decision of the District Court in appeal under section 10 of the Act in the case of a claim to a right in or over any land, other than rights of the kind specified in clauses (*a*), (*b*), (*c*) and (*d*) of section 10, is no doubt final in so far as proceedings under the Act are concerned—and the procedure prescribed in sections 8 and 9 of the Act appears to indicate that the inquiry is to be conducted in the manner prescribed in the case of a suit in an appealable case.

We are of opinion then that the stamp duty payable in respect of the appeal to the District Court is Rs. 10 under art. 17, cl. VI, sch. II, of the Court Fees Act.

FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Hutchins.

1884. July 21.

IN THE MATTER OF THE PETITION OF JOHN WALLACE.

27 Bom. 198.

Jurisdiction—Complaint against Governor and Council of Madras—21 *Geo. III*, *c.* 70, *s.* 5; 39 & 40 *Geo. III*, *c.* 79, *s.* 3; 4 *Geo. IV*, *c.* 71, *s.* 17.

Section 3 of 39 & 40 Geo. III, c. 70, which provides that the Governor and Council at Madras shall enjoy the same exemption and no other from the authority of the Supreme Court at Madras as is enjoyed by the Governor-General and Council from the jurisdiction of the Supreme Court at Calcutta, did not confer on the Supreme Court at Madras a jurisdiction over the Governor and Council of Madras similar to that conferred by 21 Geo. III, c. 21, section 5, on the Supreme Court at Calcutta over the Governor-General and Council.

THIS was an application to the High Court under s. 21 Geo. III, c. 70, s. 5.

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In re WALLACE.

The petitioner appeared in person.

The facts and argument appear sufficiently for the purpose of this report from the judgments of the Full Bench (TURNER, C.J., KERNAN and HUTCHINS, JJ.)

TURNER, C.J.—Mr. Wallace has made a complaint to this Court of certain acts of the Governor and of a past and the present Members of Council of this Presidency, which he alleges to be oppressive and injurious; and has applied to this Court to take evidence, to be hereafter used by him in the prosecution of his complaint in a competent Court in Great Britain. The question arises whether we have power to entertain the application.

Mr. Wallace founds it on the fifth section of Statute 21 Geo. III, c. 70, which enacted that, in order to prevent all abuse of the powers given to the Governor-General and Council, in case any person . . . . . should make a complaint to the Supreme Court in the manner prescribed by the Statute of any oppression or injury charging the same to have been committed by the Governor-General or any Member or Members of the Council . . . . . and should comply with the conditions required . . . . ., the party complaining should be enabled to compel, by order of the Court, the production in the Supreme Court of a true copy or copies of the order or orders of Council complained of, and to have the same authenticated by the Court, and to examine witnesses on the matter of the said complaint and also on the part of the person or persons complained of.

At the time this Statute was passed the Government of the Presidency of Madras was administered by a President and Council subject to the control of the Governor-General.

By Statute 33 Geo. III, c. 52, the civil and military government of the Presidency was vested in a Governor and three Members of Council.

By Statute 39 & 40 Geo. III, c. 79, the Crown was authorized to erect a Supreme Court at Madras, and it was provided (section 3) that the Governor and Council of Madras and the Governor-General of Fort William should enjoy the same exemption and no other from the jurisdiction of the Supreme Court to be erected at Madras as was enjoyed by the Governor-General and Council at Fort William from the jurisdiction of the Supreme Court there already by law established.

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In re WALLACE.

Mr. Wallace contends that, inasmuch as the Governor and Council of this Presidency were to enjoy "the same exemption and no other" from the authority of this Court as were enjoyed by the Governor-General and Council of Fort William, the power conferred on the Supreme Court of Fort William by the fifth section of 21 Geo. III, c. 70, was conferred on this Court, and the Governor and Council of this Presidency are subjected to the provisions of the same section.

These contentions are, in my judgment, unsound.

The provisions of Statute 21 Geo. III, c. 70, s. 5, did not create any exemption in favor of the Governor-General and the Members of his Council, nor did they confer on the Court a general power to be exercised in all cases and in respect of all persons. They subjected the Governor-General and the Members of his Council to an extraordinary liability, and conferred on the Supreme Court of Fort William an extraordinary power to be exercised on a complaint made against the Governor-General or any Member of his Council. A provision of a Statute declaring that certain persons shall enjoy the same exemptions from jurisdiction and no others as are enjoyed by a certain other person, cannot be construed as exposing the persons exempted to the exercise of an extraordinary jurisdiction to which such other person may be subjected.

Again, the terms of section 3 are intended to declare what exemptions certain persons are to enjoy, not what powers the Court is to possess. In terms they certainly do not confer any powers on the Court, and they cannot be construed as necessarily conferring on the Court by implication any extraordinary power.

A study of the Acts and Letters Patent regulating the government of India and the jurisdiction of the Courts may, I think, explain the reasons for the creation of the special power and for the restriction of its exercise; and will show that this Court is not authorized to exercise the power on a complaint made against the Governor or any Member of the Council of this Presidency.

Statute 10 Geo. III, c. 47, declared that, if any person whatsoever employed in the service of the United Company in any civil or military station, office or capacity, or deriving or claiming any power, authority or jurisdiction from the United Company, were guilty of oppressing any of His Majesty's subjects beyond the seas within their respective jurisdictions . . . . such oppressions

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might be inquired of, heard and determined in the Court of King's Bench in England, and punishment inflicted on such offenders. *In re* WALLACE.

Statute 13 Geo. III, c. 63, known as the Regulating Act, in the thirty-ninth section enacted that if any Governor-General, President or Governor in Council of any of the Company's principal or other settlements in India should commit any offence against that Act or had been or should be guilty of any crime, misdemeanour or offence committed against any of His Majesty's subjects or any inhabitants of India (an addition, it will be seen, to the terms of the preceding Statute) within their respective jurisdictions, such crimes, misdemeanours or offences might be inquired into and determined by the Court of King's Bench, and the punishments prescribed by the Act inflicted if the offender had not been before tried for the offence in India.

This Statute empowered the Crown to establish a Supreme Court at Fort William, but it exempted the Governor-General and Council from the criminal jurisdiction of the Court in respect of any offence other than treason or felony; and it exempted the persons of the Governor-General and of the Members of Council from liability to arrest or imprisonment in any action, suit or proceeding.

The thirty-fourth paragraph of the Charter of 26th March 1774, which established the Supreme Court of Fort William, was intended to declare and give effect to these exemptions.

It is well known that contentions arose between the Governor-General and Council and the Judges of the Supreme Court touching the jurisdiction of the Court, and led to the passing of Statute 21 Geo. III, c. 70.

The first section of that Act exempted the Governor-General and Council of Bengal from the jurisdiction of the Supreme Court in respect of any act, order, matter or thing committed, ordered or done by them in their public capacity and acting as Governor-General and Council. The second section practically enabled the Governor-General and Council to exercise powers uncontrolled by the Supreme Court in respect of all persons other than British subjects; for it enacted that if any person were impleaded in any action or process, civil or criminal, for any act done by the order of the Governor-General and Council in writing, he might plead the general issue and give the order in evidence.

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In re WALLACE.

The third section excepted orders affecting British subjects; the fourth declared the Governor-General and Council nevertheless answerable to competent courts in England; and then followed the fifth section, on which the present application is based, conferring on the Supreme Court the extraordinary power of holding an inquiry before the institution of proceedings where a complaint was made of oppression committed by the Governor-General or by any Member of his Council, and an undertaking given to prosecute it in England.

It will be noticed that although the provisions of 13 Geo. III, c. 63, s. 39, authorized the indictment not only of the Governor-General and Council but of the Presidents or Governors of any of the Company's settlements in the Court of King's Bench, in 21 Geo. III, c. 70, no provision is made for the taking of evidence in anticipation of the institution of proceedings in the case of any person other than the Governor-General and Council of Fort William.

There may be three explanations of this. The first is that the extraordinary power is the sequel of the removal by sections 1 and 2 of the control that would have been exercised by the Court if those sections had not been enacted. The second explanation is that the Governor-General and Council at Fort William had been constituted the supreme authority in India. By the ninth section of the Regulating Act the Governor-General and Council at Fort William were authorized to superintend and control the government and management of the Presidencies of Madras, Bombay and Bencoolen, "except in such cases where the Presidents and Councils should have received special orders" from the Company, and the Presidents and Councils were bound to obey the orders of the Governor-General and Council of Fort William. If therefore a Governor, President, or Member of Council at Madras, Bombay or Bencoolen, were guilty of oppression, the party affected might seek the intervention of the Governor-General and Council at Calcutta.

A third explanation may be that a Supreme Court had been established at Fort William and not elsewhere: and that, although the Legislature empowered the Mayor's Courts of Bombay and Madras to execute commissions and take evidence in proceedings in Parliament or in the King's Bench respecting offences committed

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in India after the institution of proceedings (13 Geo. III, c. 63, ss. 40 and 42 ; 24 Geo. III, c. 25, s. 78 ; 26 Geo. III, c. 57, s. 28), it thought it inexpedient to confer on those Courts the extraordinary power of taking evidence before the institution of proceedings.

The Statute 33 Geo. III, c. 52, established further regulations for the government of the territories of the East India Company, and provided for the appointment of Governors and Counsellors at Fort Saint George and Bombay ; but it invested the Governor-General in Council at Fort William with full power to superintend, control and direct the Governments and Presidencies of Fort Saint George and Bombay, &c., (*inter alia*) on all points relating to the civil and military government of the said Presidencies (section 40) and declared the Presidencies and Governments bound to obey the orders and directions of the Governor-General in Council except only where they should have received positive instructions from the Court of Directors or from the Secret Committee which were not known to the Governor-General and Council at the time of despatching their orders (section 41). Failure to obey the orders of the Governor-General in Council exposed the Governors and Counsellors of the other Presidencies to liability to be suspended and dismissed by the Governor-General, and to be sent to England, and subjected them to penalties (section 43).

The Statute 37 Geo. III, c. 142, empowered the Crown to erect Courts of judicature at Madras and Bombay and to appoint to them Recorders (section 9). It was declared that the new Charter which the Crown was empowered to grant and the jurisdiction to be established should extend to all British subjects residing within the factories dependent on the Governments of Madras or Bombay respectively, and that the Courts according to their respective jurisdictions should have power to try all and all manner of complaints against any of the subjects of the Crown for any crimes, misdemeanours and oppressions committed in the territories, &c., and to try all suits and actions against subjects of the Crown. But the statute expressly provided that the Courts should not be competent to try any indictment against the Governor or any of the Council not being treason or felony (section 10), that nothing in the Act should extend to subject the persons of the Governor or any of the Council to be arrested or imprisoned in any suit or proceeding, and that it should not be competent for the Courts to

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hear or determine or to entertain and exercise jurisdiction in any suit or action against the Governor or any of the Council for or on account of any act or order or any other act, matter or thing whatsoever committed, ordered or done by them in their public capacity or acting as Governor and Council (section 11).

We next come to the important Statute 39 & 40 Geo. III, c. 79. After reciting the Charter of George II which constituted civil and criminal Courts in the Company's territories and that the Charter had been altered in so far as it respected the administration of justice in Madras by Statute 37 Geo. III, c. 42, and in so far as it respected the administration of justice in Bengal by Statute 13 Geo. III, c. 63 (it will be noticed that no reference is made in the recital to Statute 21 Geo. III, c. 70), it authorized the Crown by Letters Patent to erect a Supreme Court at Madras and to empower the Court to exercise such . . . . . jurisdictions, to be invested with such power and authorities and subject to the same limitations, restrictions, and control within Fort Saint George and the Town of Madras and the factories subordinate thereto, and the territories then or thereafter dependent upon the Government of Madras, as the Supreme Court at Fort William was invested with or subject to by virtue of any law then inforce and unrepealed, or by that Act should be invested with and subject to within Fort William or the kingdoms and provinces of Bengal, Behar and Orissa (section 2). Then follows the proviso on which Mr. Wallace relies, "provided always that the Governor and Council at Madras and the Governor-General of Fort William shall enjoy the same exemption and no other from the authority of the Supreme Court of Judicature to be there erected as is enjoyed by the said Governor-General and Council at Fort William aforesaid from the jurisdiction of the Supreme Court of Judicature there already by law established."

The Act, it will be observed, did not itself create the Supreme Court, but authorized the Crown to create it and to invest it with powers. Whether it was competent to the Crown to erect a Court with less powers than those possessed by the Supreme Court at Bengal, we need not consider. The Court derived its powers from the combined effect of the Act and the Charter, and if in the Charter less powers were given to it than were enjoyed by the Supreme Court, the Charter might have been in that respect an

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incomplete or defective exercise by the Crown of the authority declared by the Statute, but I apprehend the Court would not have enjoyed the omitted powers.

If I am in error in so holding and, immediately on the exercise by the Crown of the authority conferred on it to erect a Court, there attached to the Court in virtue of the Act all the powers of the Court at Fort William; the extraordinary power enjoyed by the Court at Fort William was exercisable only in the case of the Governor-General or of his Council.

The Letters Patent issued by the Crown in pursuance of the Act were dated 26th December 1800. They constituted a Supreme Court for this Presidency, and, in express terms, declared the jurisdiction and powers to be exercised and enjoyed by it, and they also declared expressly the restrictions to which its jurisdiction and powers are subject, and the exemptions which are to be enjoyed by the Governor and Council. They made no reference to the extraordinary power conferred by the Statute 21 Geo. III, c. 70, on the Supreme Court at Fort William; on the other hand, they expressly declared exemptions from the jurisdiction of the Court to be enjoyed by the Governor-General of Fort William and the Governor and Council of Madras. Thus clause 23 exempted from arrest and imprisonment the persons of those officers and pronounced the Court incompetent to hear or determine or entertain or exercise jurisdiction in any suit or action against the Governor-General or the Governor or any of the Council of Madras for or on account of any act or order or any other act, matter or thing whatsoever committed, ordered, or done by them in their public capacity. It declared also that the Court should not have or exercise any jurisdiction in any matter concerning the revenue . . . . . or concerning any act done according to the usage and practice of the country or the regulations of the Governor and Council. Although 21 Geo. III, c. 70, was not referred to in the preamble to section 2, 39 & 40 Geo. III, c. 79, it was, of course, competent to the Crown to have regard to it in the exercise of its authority to confer on the Supreme Court at Madras the same powers as were enjoyed by the Supreme Court at Fort William, and in drafting clause 23 of the Charter, it is clear that the provisions of 21 Geo. III, c. 70, were considered. The prohibition to take cognizance of matters affecting the revenue is in part taken

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verbatim from the Statute. The provisions of the clause respecting landholders and farmers and persons employed by the Company nearly follow the terms of sections 9 and 10 of the Statute. The provisions respecting suits against judicial officers are analogous to and expressly incorporate the provisions of sections 24—26 of the Statute. Here, then, we might expect to have found reference made to the extraordinary power of the Supreme Court of Fort William to take evidence against the Governor-General of Fort William, and here we should have found the extraordinary power conferred on the Supreme Court of Madras to take evidence in anticipation of proceedings against the Governor and Council of Madras, if it had been thought the Statute warranted the conference of such power on the Court, and there had been an intention to confer it.

Clause 35 of the Letters Patent declared the Court incompetent to hear, try or determine any indictment or information against the Governor-General of Fort William or the Governor or any of Council of Fort Saint George except for treason or felony.

These exemptions from the civil and criminal jurisdiction of the Court were, in my judgment, intended to express the provision enacted in 39 & 40 Geo. III, c. 79, and fully satisfy its terms.

In conferring on the Governor and his Council the same exemptions as were enjoyed by the Governor-General and his Council, the Legislature did not subject them to the same liability to inquiry.

The Statute 4 Geo. IV, c. 71, which sanctioned the establishment of the Supreme Court at Bombay, expressly authorized and required the Supreme Court to be there established and the Supreme Court at Madras within their local jurisdictions "to execute, perform and fulfil all such acts, authorities, duties, matters and things whatsoever," as the Supreme Court at Fort William was or might be lawfully authorized or empowered or directed to do, execute and perform within its local jurisdiction (section 17).

The extraordinary power conferred on the Supreme Court at Fort William by 21 Geo. III, c. 70, s. 5, was exercisable only in the case of a complaint made against the Governor-General and his Council: and in conferring on the Supreme Courts of Madras and Bombay "such" powers as were conferred on the Supreme

Court at Fort William, the Statute 4 Geo. IV, c. 71, authorized and required this Court to exercise the extraordinary power created by 21 Geo. III, c. 71, s. 5, only when a complaint was made against the persons named in that Act.

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The administration of the territories of the Crown in India was again dealt with by 3 & 4 Wm. IV, c. 85, which authorized the division of the Presidency of Fort William and the appointment of Governors and Councils to Presidencies of Fort William and Agra.

This Statute declared that the Governors and Members of Council appointed under the Act should severally have all the rights, powers and immunities which the Governors and Members of Council of Fort St. George and Bombay then had in their respective presidencies.

Although the Directors were authorized by subsequent Statutes to suspend the execution of the contemplated division of the Presidency of Fort William, the provision enabling the creation of the Presidency of Agra remained in force for some years: but I do not find that any provision was made for subjecting the Governors and Council of Fort William and Agra (if one should be appointed) to liability to the extraordinary power conferred on the Supreme Court by 21 Geo. III, c. 71, s. 5.

The Act again recognized the supreme authority of the Governor-General in Council, investing him with full power to control the Governors and Governors in Council of Fort William, Fort St. George, Bombay and Agra in all points relating to the civil or military administration of the Presidencies respectively, and declared the Governors and Governors in Council bound to obey the orders and instructions of the Governor-General in Council in all cases whatsoever (section 65).

No instance is cited in which the Supreme Court or this Court has taken evidence in anticipation of the institution of proceedings on a complaint made against the Governor or any Member of the Council of the presidency.

The conclusion then at which I have arrived is that the Legislature has not conferred on the Court power to entertain such an application as Mr. Wallace has made.

It is hardly, I think, to be desired that the state of the law were other than I take it to be. The extraordinary power created

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by 21 Geo. III, c. 70, is obviously attended with this inconvenience, that it must be exercised before there can be any certain knowledge what issues will require determination, and therefore what evidence is material. Moreover, the probable reason for the creation of the power, the risk of the loss of testimony owing to the delay entailed by an application to the Court in England is now greatly modified, and the provision has practically become obsolete. In the present case Mr. Wallace, had he been so advised, might have commenced proceedings in England some months ago. A late Member of Council, whose conduct and motives he principally impugns, has now left India, and Mr. Wallace, although he has included this gentleman in the application, admits it could not proceed against him until he had been served with notice. It would be inconvenient that such evidence as might be admissible should be taken twice over.

As I hold the Court is not competent to entertain the application, it is unnecessary that I should advert to its substance or terms.

KERNAN, J.—Section 5 of the Act 21 Geo. III, c. 70, applies in terms to the Governor-General in Council and to the Supreme Court at Fort William (Calcutta) only.

That section 5 has not been in terms extended to any President or Governor and Council in Madras or to any of the Courts established in Madras. When the Act 21 Geo. III, c. 70, was passed, the Mayor's Court existed in Madras and there was then a President and Council who governed Madras subject to the Governor-General. At that time also the Governor-General and Council and the President and Council of Madras were liable to indictment, information or action in the King's Bench in England for any acts of oppression done in India, 10 Geo. III, c. 47, s. 14, and 13 Geo. III, c. 63, s. 39. As the power contained in section 5 did not apply to Madras, there would appear to have been some special reason why it was confined to Calcutta, and probably the reason is to be found in the recital in that Act of the dissensions between the Governor-General and Council and the Supreme Court at Calcutta. No doubt the power given by section 5 might be used in aid of any proceeding in England against the Governor-General and Council and Governor and Council of Madras such as above referred to. But as it was not given in terms to any Court

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in Madras, this Court has no jurisdiction to apply it here unless the jurisdiction has been conferred on the Court by necessary implication arising from some Act or Charter.

The power is an extraordinary one and not one which in its ordinary jurisdiction the Court would possess.

It is contended that this power is, by necessary implication arising from the provisions of 39 & 40 Geo. III, c. 79, ss. 2 and 3, given to the Supreme Court, Madras, and therefore to this Court. The Chief Justice has already shown that the Act 39 & 40, section 2, did not extend all the powers of the Calcutta Supreme Court to the Madras Supreme Court, and that the Charters granted to the Madras Supreme Court did not, nor did the Act of 24 & 25 Vict., c. 25, or the Charters granted under it, extend all the powers of the Calcutta Supreme Court to the Madras Supreme Court or to the High Court. Therefore section 2 of 39 & 40 Geo. III does not create the implication contended for.

Section 3 of 39 & 40 Geo. III, c. 79, is mainly relied on by Mr. Wallace. That section provides that the Governor-General and Council and the Governor and Council of Madras shall enjoy the same exemption and no other from the authority of the Supreme Court of Madras as is enjoyed by the Governor-General and Council from the jurisdiction of the Supreme Court at Calcutta.

The question then is, what was the exemption from the jurisdiction of the Supreme Court at Calcutta enjoyed by the Governor-General and Council. Certain exemptions are stated in sections 15 and 17 in the Act 13 Geo. III, c. 63, and in 21 Geo. III, c. 70.

The Act 13 Geo. III, c. 63, s. 15, provides that the said court (Supreme Court, Calcutta) shall not be competent to hear, try or determine any indictment or information against the Governor-General or any of the Council for the time being for any offence, not being treason or felony, which the Governor-General or any of the Council may be charged with having committed in Bengal, Behar or Orissa.

Section 17 of the same Act provides that nothing in the Act shall extend to subject the Governor-General or any of the Council, Chief Justice and Judges to be arrested or imprisoned upon any action or suit or proceeding in the said court.

The Act 21 Geo. III, c. 70, by section 1 provides that the Governor and Council of Bengal shall not be subject to the jurisdic-

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tion of the Supreme Court in Bengal for or by reason of any act or order, or any matter or thing whatsoever committed, ordered or done by them in their public capacity only and acting as Governor-General and Council.

This last Act, it is remarkable, uses the same words "jurisdiction of the Supreme Court" as section 3 of the 39 & 40 Geo. III. The exemptions given by these Acts appear to me to be "the exemption" from the jurisdiction of the Supreme Court that is referred to in the 39 & 40 Geo. III, s. 3.

But it is argued that under section 5, 21 Geo. III, c. 70, the Governor-General and Council were not exempt from the jurisdiction of the Supreme Court of Bengal as regards a complaint, and the power given thereby to the Supreme Court, and that therefore the Governor of Madras is not exempt from the jurisdiction of this court.

Recollecting the positive provision in section 1 of 21 Geo. III, c. 70, it cannot be contended, I think, that section 5 creates general jurisdiction in the Supreme Court over the Governor-General and Council in respect of any of those acts done by them in their public capacity.

The provision in section 5 merely gave the Supreme Court a power to a complainant to compel production of copies of orders and to take evidence. If the orders were in possession of the Governor-General and Council no doubt the Court could compel the production of copies, and so far the Governor should be subject to that special jurisdiction. But this power in section 5 did not subject the Governor and Council to the general jurisdiction of the Supreme Court, which is the jurisdiction that section 3 of 39 & 40 Geo. III seems to me to contemplate. The Act 21 Geo. III, c. 70, is not specially referred to in the Act 39 & 40 Geo. III, though the Acts 13 Geo. III, c. 63, and 37 Geo. III, c. 142, constituting Governors in Madras and Bombay are thereby referred to.

But even if the Governor-General was not exempt from the jurisdiction of the Supreme Court under section 5, does it follow by necessary implication that under the Act of 39 & 40 Geo. III the Supreme Court of Madras and this Court became invested with the special power given by section 5?

In my judgment it does not so follow. No doubt acts in *pari materiâ* must be read and construed together, but without express words in an Act, or an implication much stronger than exists in this case conferring the special power of section 5 on the Supreme

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Court of Madras, I do not think that Court or this Court could or can exercise such powers. I agree that the powers given by 4 Geo. IV, c. 71, would not authorize this Court to entertain a complaint against the Governor of Madras under 21 Geo. III, c. 70, though they would authorize the exercise of them as regards the Governor-General and Council.

I think the complaint of Mr. Wallace cannot be entertained by this Court for want of jurisdiction.

HUTCHINS, J.—I am of the same opinion, and as my reasons are in the main those which have been given by my learned colleagues, I shall not recapitulate them at length.

The power which we are asked to exercise is not one incidental to our own jurisdiction, but one which, if it exists at all, would be merely ancillary to the jurisdiction of the Court of Queen's Bench. It was not vested even in the Supreme Court of Bengal as against local Governments, and I think the reason must have been that they were subject to the control of the Governor-General. There was never the same danger of their acting in an arbitrary manner and refusing copies of their orders, and therefore not the same necessity for compelling them to furnish the aggrieved party with the means of satisfying the Court of King's Bench as to his having an apparent cause of action. It may perhaps be open to argument that under the Statute 13 Geo. III, c. 63, s. 9, the Governor-General's control was only to be exercised in matters of peace and war, but the latter part of the section required the local Government to keep the Governor-General acquainted with all transactions and matters whatsoever, and would at all events have authorized the Governor-General to call for copies of all the proceedings in case of a complaint to him by any person oppressed by the local Government. And long before a Supreme Court had been erected at Madras, 33 Geo. III, c. 52, had declared the local Governments bound at their peril to obey all orders passed by the Governor-General in Council. There was then no occasion to confer on the new Supreme Court the extraordinary power given by 21 Geo. III, c. 70, s. 5, and I am satisfied that it was not given by 39 and 40 Geo. III, c. 79, s. 3, while the letters patent most certainly did not confer it.

If I had thought that this court ever possessed the power, I should have wished to consider whether we are still bound to exer-

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cise it. As the Chief Justice has pointed out, it has practically become obsolete. It is in no way necessary to enable Mr. Wallace to obtain complete justice, for copies of all the papers are already in his possession and he has all the materials necessary for his commencing proceedings, if so advised, in England.

ORIGINAL CIVIL.

Before Mr. Justice Kernan.

1884. October 16.

J. C. SHAW AND OTHERS (PLAINTIFFS),

and

H. BILL AND OTHERS (DEFENDANTS).*

Contract—Executory sale—Delivery order—Appropriation of goods to contract—Substitution of liability—Condition precedent—Delivery in certain months—Payment in advance—Refusal to deliver—Damages.

In January 1883 W. & Co. of Madras contracted to deliver to P. & Co. of Madras certain goods of a certain quality, subject to survey before shipment, at a certain price "f.o.b. Cocanada, delivery in April and May; terms, full advance and local exchange ¼ per cent. payable at Madras."

This contract was contained in bought and sold notes. It was further agreed that the goods were to be delivered on board any ship P. & Co. might direct at the port of Cocanada.

P. & Co. paid the full amount of the purchase money in January.

On the 31st March P. & Co. wrote to W. & Co. requesting that the goods might be marked in a certain way.

On the 18th May W. & Co. wrote to P. & Co., enclosing a letter from W. & Co. to S. N. & Co. of Cocanada requesting S. N. & Co. to hold the goods (which were said to have been purchased by W. & Co. from S. N. & Co. and to be in godown) at the disposal of P. & Co. In the letter to P. & Co. from W. & Co. the goods were also said to be in godown at that date. On the same day P. & Co. wrote to S. N. & Co. enclosing a delivery order for the goods (which P. & Co. stated they believed to be in godown), requesting that they might be marked in a particular way.

On the 25th May S. N. & Co. wrote to P. & Co. informing them that they held the goods at P. & Co.'s disposal.

On the 28th May P. & Co. received this letter. On the 31st May P. & Co. chartered a ship to take on board the said goods and other goods bought by P. & Co. from S. N. & Co. and others, and wrote to S. N. & Co. informing them that the ship would arrive about the 12th June.

On the 5th June P. & Co. wrote to S. N. & Co. acknowledging receipt of a letter which stated that only a portion of the goods to be shipped was ready. On the 9th

* Civil Suit No. 273 of 1883.

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June P. & Co. received a letter from S. N. & Co. stating that all the goods were ready. On the 17th June the ship arrived at Cocanada. On the 21st June S. N. & Co. stopped payment and ceased to carry on business. No goods were delivered according to the contract. S. N. & Co. never had the goods to deliver between 18th May and 17th June.

In a suit by P. & Co. to recover from W. & Co. the price paid and damages for breach of contract to deliver the goods, it was contended for W. & Co.—

I.—That the transfer of the delivery order of the 18th May amounted to a delivery of the goods.

Held, that as S. N. & Co. had neither had possession of the goods to be delivered nor had appropriated any goods to the contract, the delivery order was inoperative.

II.—That the acceptance of the delivery order by P. & Co. amounted to an agreement that S. N. & Co. should deliver to P. & Co. the goods when ready, and that the liability of S. N. & Co. was substituted for that of W. & Co.

Held, that such an agreement could not be inferred.

III.—That as S. N. & Co. by accepting the delivery order were estopped from denying that they had possession of the goods as against P. & Co., S. N. & Co. were discharged as against W. & Co., and therefore P. & Co. had no remedy against W. & Co.

Held, (1) that S. N. & Co. were not discharged as against W. & Co., as S. N. & Co.'s representations were false; (2) that even if S. N. & Co. were discharged, this could not affect P. & Co.

IV.—That as P. & Co. had not supplied a ship in May, they had failed to perform their part of the contract and could not recover.

Held, distinguishing *Bowes* v. *Shand* (L.R., 2 App. Ca., 455) and *Reuter* v. *Sala* (L.R., 4 C.P.D., 239), that the presence of the ship in May was not a condition precedent to P. & Co. recovering.

V.—That W. & Co. had rescinded the contract on the 29th June by refusing to deliver, and therefore P. & Co. were only entitled to recover the price paid.

Held, that W. & Co. were not entitled to rescind the contract.

Held, also that P. & Co., having paid in advance, were entitled to a reasonable time after the 29th June to prepare to purchase other goods, and were entitled to the difference between the contract price and the market price on the 1st of July as damages for the breach to deliver.

THE facts and arguments in this case appear sufficiently for the purpose of this report from the judgment of the Court.

The Advocate-General (Hon. *P. O'Sullivan*) and Mr. *Tarrant* for plaintiffs.

Mr. *Shephard* and Mr. *Grant* for defendants.

KERNAN, J.—The plaintiffs, Messrs. Parry & Co., merchants at Madras, sue Messrs. Wilson & Co., also merchants of Madras, for repayment of the purchase money, Rs. 30,295-5-5, paid to the

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defendants for 500 tons of palmyra jaggery, which the defendants failed to deliver, with interest thereon at 9 per cent. per annum from the date of sale, and also payment of damages sustained by the plaintiffs by reason of the defendants' breach of contract to deliver the 500 tons, amounting in all, as detailed in the schedule to the plaint, to Rs. 48,236-9-1. There is no dispute as to the facts of the sale and purchase, or of the terms of the same. The sales and purchases were made between the parties through the medium of a broker, who signed for both parties bought and sold notes, ex. E.

The first sale and purchase was made on the 11th of January 1883, by the said bought and sold notes, in the following form:—"200 tons palmyra jaggery, fair average of the season, subject to survey before shipment, at 17-6 per candy f.o.b. Cocanada, delivery in April and May. Terms: full advance and local exchange $\frac{3}{4}$ per cent. payable at Madras." The second sale and purchase was made on the 16th of January 1883, of 100 tons palmyra jaggery, in exactly the same form as the former. The third sale and purchase was made on the 19th of January 1883, for 200 tons, also in the same form.. The bought and sold notes do not state which party should provide shipping on which the goods were to be delivered f.o.b., but the plaint in paragraph 2 states that the contract was that such goods were to be delivered on board "any ship the plaintiffs might direct at the port of Cocanada," and defendants admit that such was the contract. On the 12th, 17th, and 28th of January 1883 the plaintiffs paid the defendants the full amount for the goods in advance at the contract price, and local exchange at $\frac{3}{4}$, amounting in all to Rs. 39,295-5-5.

On the 31st March 1883 plaintiffs wrote to defendants a note of that date requesting the jaggery to be marked $\frac{\text{P. \& Co.}}{\text{W.}}$. Except that letter, there was no communication between the plaintiffs and defendants on the subject of the contract until the 18th of May 1883, on which date the defendants wrote and sent to the plaintiffs the following letter:—

"PALMYRA JAGGERY CONTRACT.

"Enclosed you will find letter addressed to Messrs. Stephenson, Nixon & Co., Cocanada, requesting them to hold at your disposal the 500 tons sold to you, which are now in godown at Cocanada.

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Please instruct Messrs. Stephenson, Nixon & Co. as to marks and shipment."

The letter of defendants to Stephenson, Nixon & Co. enclosed is as follows:—

"Please hold at disposal of Messrs. Parry & Co. 500 tons palmyra jaggery purchased by you on our account, which we learn from your telegram of to-day's date is now ready in godown. Messrs. Parry & Co. will instruct you direct regarding shipment."

The plaintiffs on the 18th of May wrote to Stephenson, Nixon & Co. a letter of that date as follows:—

"We enclose delivery order for 500 tons jaggery from Messrs. Wilson & Co., which we understand you have in godown, regarding the shipment of which we will address you again shortly.

"*P.S.*—Please mark the bags P. & Co."

The delivery order of the 18th of May, addressed to Stephenson, Nixon & Co., was enclosed in that letter. On the 25th of May 1883 Stephenson, Nixon & Co. wrote to the plaintiffs a letter of that date as follows:—

"We are in receipt of your letter of the 18th instant, enclosing delivery order from Messrs. Wilson & Co. for 500 tons palmyra jaggery, which, as requested, we hold at your disposal."

That letter was received by the plaintiffs in Madras on the 28th of May.

On the 31st of May 1883 the plaintiffs chartered the ship *Mofussilite* to take on board the 500 tons sold by the defendants, and also other jaggery purchased by the plaintiffs from Stephenson, Nixon & Co. and others. On the 31st May plaintiffs wrote to Stephenson, Nixon & Co. a letter of that date:—

"We are in receipt of yours of 25th, the contents of which are noted. We have chartered the *Mofussilite* to take full cargo jaggery to Cuddalore. You may expect her on the 9th to 12th; we will wire departure. We send her to your consignment. The *Mofussilite* will carry 1,300 tons, on account of which we have shipping orders for 600 tons. Please see this is pushed off sharp, and fill up balance from 900 tons you hold of ours."

On the 5th June plaintiffs wrote to Stephenson, Nixon & Co. acknowledging a letter which stated only 500 tons were ready. The ship sailed on the 15th of June, and arrived off Cocanada in ballast on or about the 17th, consigned to Messrs. Stephenson,

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Nixon & Co. The plaintiffs received telegram from Stephenson, Nixon & Co. dated the 9th of June, stating that all the palmyra jaggery was ready for *Mofussilite*, and by letter of the 12th of June plaintiffs acknowledged that telegram. Messrs. Stephenson, Nixon & Co. stopped payment on the 21st of June 1883 and ceased then to carry on trade, and no jaggery had been then or was afterwards delivered f.o b. the *Mofussilite* or at Cocanada by the defendants in fulfilment of their contracts of January 1883, and they were not ready to do so. On the 21st of June 1883 the defendants, by telegram of that date, requested Innes & Co., Cocanada, to act for them and to take possession from Stephenson, Nixon & Co. of 500 tons of palmyra jaggery sold to plaintiffs, if not already shipped, and also of 500 other tons of palmyra jaggery of theirs and other goods. Innes & Co., by telegram to the defendants dated the 21st of June, stated "produce nearly all ready, but in hands of the original sellers, who had been paid 10 per cent., but nothing was shipped." On the 22nd June, by telegram of that date to the defendants, Innes & Co. stated that 800 tons jaggery were ready, and defendants would have to pay about Rs. 19-8 per candy for delivery. On the 22nd June, Stephenson, Nixon & Co. gave a delivery order on Mr. Phillips of Cocanada for 600 tons to Innes & Co. for defendants, and on the 23rd of June Stephenson, Nixon & Co. gave a delivery order to Simpson & Co. for plaintiffs for 400 tons. Neither lot was paid for. After the failure of Stephenson, Nixon & Co. becoming known in Madras, J. C. Shaw, one of the plaintiffs, and R. S. Turnbull, one of the defendants, had two interviews on the subject of the 500 tons sold to the plaintiffs. At one interview they arranged that the question of their rights and liabilities should be referred to their lawyers. However, as the plaintiffs required 500 tons to replace the amount sold by the defendants, and as the defendants had not jaggery to deliver, and as the question of their liability to deliver was unsettled, it was agreed between the said Shaw and Turnbull that the plaintiffs should pay to the original sellers the price required, viz., Rs. 19-8 per candy for other 500 tons to be delivered f.o.b. the *Mofussilite*. The plaintiffs accordingly paid Rs. 45,115-2-6 on the 7th of July 1883 and obtained 500 tons of palmyra jaggery f.o.b. the *Mofussilite*. A second interview took place between Messrs. Shaw and Turnbull in reference to

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the 500 tons sold to the plaintiffs, but both of them state that there was no agreement come to.

On the 28th of June, whilst the *Mofussilite* was off Cocanada, the plaintiffs wrote and sent to the defendants a letter as follows:—

"Messrs. WILSON AND Co., Madras.

"DEAR SIRS,—The *Mofussilite*, now at Cocanada, is waiting for the 500 tons palmyra jaggery purchased by us from you, and the ship will shortly be on demurrage. As Messrs. Stephenson, Nixon & Co., your agents, have failed to deliver the 500 tons as per your order, we will feel obliged by your advising us what arrangements in substitution you propose. Please send us an exact copy of the delivery order given by you to us on Messrs. Stephenson, Nixon & Co.

"Yours faithfully,
"(Signed) PARRY & Co."

To that letter the defendants on the 29th of June wrote and sent to plaintiffs a letter as follows:—

"Messrs. PARRY & Co., Madras.

"DEAR SIRS,—We are in receipt of your letter of yesterday. We are not now prepared to deliver you 500 (five hundred) tons of jaggery for the *Mofussilite*. On the 18th May last we gave you a delivery order on Messrs. Stephenson, Nixon & Co. for the 500 tons of palmyra jaggery which we sold to you for May delivery. You accepted such order and yourselves arranged with Messrs. Stephenson, Nixon & Co. to take delivery, and we must therefore refer you to them for the jaggery. But if you have not already taken delivery of the jaggery, it is no fault of ours. The contract was, as already mentioned, for delivery in May, and if our delivery order and your subsequent arrangements with Messrs. Stephenson, Nixon & Co. did not amount to a delivery—which we contend they did—then you have committed a breach of contract by failing to take delivery in May, and we are not bound now to deliver. As requested, we enclose a copy of our delivery order.

"We are, dear Sirs,
"Yours faithfully,
"MADRAS, 29th June 1883. (Signed) WILSON & Co."

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"DEAR SIRS,—Please hold at the disposal of Messrs. Parry & Co. 500 tons of the palmyra jaggery purchased by you on our account, which we learn from your telegram of to-day's date is now ready in godown.

"Messrs. Parry & Co. will instruct you direct regarding shipment.

"We are, dear Sirs,
"Yours faithfully,
"MADRAS, 18th May 1883. (Signed) WILSON & Co."

This suit was filed on the 19th of October 1883. The plaint stated the contracts and payment by the plaintiffs, and the letter of 18th of May from the defendants, and the delivery order and acceptance of it, and the chartering of the ship and the letters of the 27th and 28th of June, and also stated on belief "Stephenson Nixon & Co., defendants' agents, had not on the 18th of May 1883, or at any time subsequent to that date, 500 tons of palmyra jaggery in their godown as alleged ready for delivery."

Defendants filed their written statement, and admitted the contract as in the plaint mentioned, and that plaintiffs paid the price therefor. They state as follows: Stephenson, Nixon & Co. were not the agents of the defendants, but were independent merchants. The letter of the 18th May, forwarding the delivery order on Stephenson, Nixon & Co., constituted a delivery of the 500 tons of jaggery by the defendants, and plaintiffs accepted the delivery order as a delivery of the 500 tons and as fulfilment on the part of the defendants of their contract. According to custom, the delivery order, if accepted by the purchaser, is a constructive delivery of the goods to exonerate the defendants and substitute Stephenson, Nixon & Co. in their place, and plaintiffs acted on that custom and accepted the order as delivery. Stephenson, Nixon & Co. were, on the 1st of May, able and in a position to deliver the 500 tons, and they attorned to the plaintiffs and ceased to be responsible to the defendants for the 500 tons, and became responsible to the plaintiffs. Plaintiffs failed to take delivery from Stephenson, Nixon & Co. within the time, and if the letter of 18th May and action thereon was not delivery, then in consequence of plaintiffs not taking delivery in time they committed breach of the contract and the defendants are free from liability. If plaintiffs

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had arranged to take delivery in time, then the contract for delivery would have been performed, and it is therefore plaintiffs' own fault that delivery did not take place. The plaintiffs were guilty of laches in not receiving the goods in time, and retained the delivery order and led the defendants to believe that the contract was fulfilled, and prevented defendants from taking measures to protect their interests with Stephenson, Nixon & Co. in respect of the 500 tons (for which defendants had paid Stephenson, Nixon & Co.) and insure delivery, and thereby caused a loss equal in amount to plaintiffs' claim.

The issues settled were as follows:—

i. Were Stephenson, Nixon & Co. the agents of the defendants in regard to the delivery of jaggery?

ii. Did the delivery order of 18th May 1883 amount to a delivery, and was it accepted by plaintiffs as a fulfilment of the contract?

iii. Is there a custom, as alleged in paragraph 4 of the written statement, and was such custom acted on?

iv. Did the plaintiffs accept Stephenson, Nixon & Co. as the persons responsible to them, and exonerate defendants?

v. Were Stephenson, Nixon & Co. in a position to deliver the jaggery, and had they the jaggery available in their godowns at any time between the 18th May and 17th June 1883?

vi. Are the defendants exonerated by plaintiffs' neglect or failure to take delivery before 17th June 1883?

vii. Have the plaintiffs, by their laches or conduct, caused loss to defendants, and are defendants entitled to set off such loss to any and what extent against plaintiffs' claim?

viii. To what amount of damages, if any, are plaintiffs entitled?

ix. Are they entitled to recover back the amount paid to defendants?

x. Did the cause of action arise on the 7th July 1883, or on what date?

The first issue for consideration is the second part of the fifth issue, whether Stephenson, Nixon & Co. had the jaggery available

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in their godowns at any time between the 18th of May and the 17th of June 1883. It is quite clear, on the evidence of Nixon, that Stephenson, Nixon & Co. never had the jaggery or any part of it, or any jaggery available in their godowns or in their custody or possession at any time during 1883. Though they had rented a godown, they did not use it, but let it out to Ramakrishnaya. They entered into contract with other merchants to buy f.o.b. In June 1883 they had contracts with Mr. Phillips for the supply to them of 600 tons of jaggery in the end of June, and a contract with Ramakrishnaya for the supply to them of 700 tons of jaggery in June 1883, and a contract with Messrs. Gill, Deane & Co. for a supply of 200 tons to them in June 1883. But in all these cases the several vendors retained in their own possession and custody the goods agreed to be sold, the prices therefor not having been paid in any instance by Stephenson, Nixon & Co., although in the case of Phillips 10 per cent. had been paid by them. In some cases the vendors to Stephenson, Nixon & Co. had not themselves possession between the 18th of May and the 17th of June of all the goods agreed to be sold, as their vendors had not delivered to them. The 500 tons of jaggery referred to in the delivery order was non-existent. The allegation in the plaint that Stephenson, Nixon & Co. had not possession of the 500 tons was not denied by the defendants in their written statement. The defendants early in 1883 contracted to buy from Stephenson, Nixon & Co. 1,000 tons of jaggery, not specific jaggery, but unspecified; and on the 18th of May Stephenson, Nixon & Co. telegraphed to the defendants that 600 tons were ready, and deliveries recommencing next week. The defendants inferred from that telegram that Stephenson, Nixon & Co. had the possession of the 600 tons jaggery in godowns, but the fact undoubtedly was not so. The main ground put forward as defence is mentioned in the first part of the second issue, which is "Did the delivery order of the 18th of May amount to a delivery?" To give an answer to this question, it is necessary to bear in mind that the contracts of January 1883 by the defendants, were sales of 500 tons of jaggery, fair average of the vendors, f.o.b. at Cocanada, delivery in April—May. No particular goods were specified, and defendants were at liberty to supply any 500 tons corresponding to the description. The defendants' contracts were executory. The defendants were

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bound, in order to fulfil their contract, to give the plaintiffs the property in and possession, actual or constructive, of 500 tons of jaggery specified and identified.

In Benjamin on Sales, Bk. II, ch. V, it is said: "After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the *appropriation* of specific goods to the contract. The sole element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages instead of being completed at one time." In that chapter of Benjamin many decisions are referred to. In *Campbell* v. *Mersey Docks and Harbour Board,*(1) Erle, C.J., says that it has been established by a long series of cases (some referred to) that the purchaser of an unascertained portion of a larger bulk acquires no property in any part until there has been a separation and an appropriation assented to by vendor and vendee. *Sparks* v. *Marshall* (2) was a case where Bamford sold to the plaintiff 500 to 700 barrels of oats to be shipped by Thos. John and Son, Youghal, to be delivered at Portsmouth. Some days after, Bamford informed plaintiffs that Messrs. John and Son engaged room on board the *Gibraltar* packet "to take 600 barrels of oats on your account." Plaintiff insured, and in an action against the under-writers, Tindal, C.J., said that Bamford's letter to plaintiffs was an appropriation of the oats on board the *Gibraltar* packet.

In *Bryans* v. *Nix*(3) plaintiffs accepted a bill against two cargoes of oats, represented by two receipts signed by the masters of two boats, Nos. 604 and 54, whereby the masters acknowledged to have received on board their respective boats a number of barrels. These receipts, dated 31st January, were received by the plaintiffs on the 7th of February in a letter from the owner Tempany, dated the 2nd of February, and they thereupon accepted the bill. The owner Tempany, on the 6th of February gave orders to his agent to deliver the cargoes of both boats to the defendant, who afterwards obtained possession of the cargoes. The loading of boat No. 604 was complete on the 31st of January, but the loading of boat No. 54 only began on the 1st February. As to the cargo of No. 604 the Court held that the intention

(1) 14 C.B., N.S., 412. (2) 2 Bing. N.C., 761. (3) 4 M. & W., 775.

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of the consignor was to vest the property in the consignees, the plaintiffs, from the moment of delivery of the goods to the boat master. Parke, B., says if the intention of the parties to pass the property in certain ascertained chattels is established, and they are placed in the hands of a depositary, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, that is enough, and it matters not by what document this is effected. As to boat No. 54 Parke, B., says that at the time of the agreement, proved by the boat receipt of the 31st of January, to hold the 500 barrels for plaintiffs, there were no such oats on board, and consequently no specific chattels were held for them. The undertaking of the boat master had nothing to operate on, and though Tempany, the owner, had prepared a quantity of oats to put on board, those oats were still his property; he might have altered their destination, and sold them to any one else; the master's receipts no more attached to them than to any other quantity of oats belonging to Tempany. But before the 530 barrels were shipped, and before any appropriation or complete delivery of the oats to the plaintiff had taken place, Tempany was induced to enter into an agreement with the defendant. Until the oats were appropriated by some new act, both contracts (with defendant and plaintiffs by Tempany) were executory. On the 9th of February the appropriation took place by a new boat receipt then given for the oats then on board. There was judgment for the plaintiffs as to boat No. 604, and for the defendant as to boat No. 54. In the course of the case, Parke, B., says: "In order to pass the property, the specific chattels must be ascertained which are to pass. Now here the oats loaded in boat No. 54 at the time when the receipts were transmitted were still in Tempany's premises, and he might have performed the contract with the plaintiffs by supplying any other oats of the same quality and amount." Alderson, B., says "the goods he (defendant) describes in his letter of 2nd February are in truth non-existing."

Like this case, in *Rohde* v. *Thwaites*(1) plaintiff bought 20 hogsheads of sugar out of a lot of sugar in bulk. Four hogsheads were filled and taken away; sixteen other hogsheads were filled by the vendor, and he gave notice to the purchaser to remove them,

(1) 6 B. & C., 688.

and defendant agreed to do so. As to these sixteen it was held there was appropriation, and the property passed to the defendant. Bayley, J., says that where a man sells part of a larger parcel of goods, and it is at his option to select part for the vendor, as soon as he appropriates part for the benefit of the vendor, the property in the article sold passes to the vendor, though the vendor is not bound to part with it until he is paid his. Applying these principles to this case, the defendants, in order to pass the property in 500 tons of jaggery under the contract, should have appropriated specific existing 500 tons to the plaintiffs' contract, and until that was done, no property in any 500 tons passed to the plaintiffs. Stephenson, Nixon & Co. had not possession of even the 600 tons, or any part of it, and therefore there was no jaggery on which their letter of the 25th of May could operate. A delivery order does not pass the property mentioned in it as a bill of lading would do.

If Stephenson, Nixon & Co. had had 500 tons belonging to the defendants in their possession as agents, or depositaries, or appropriated to them, then the delivery order would be evidence of appropriation by the defendants of the 500 tons, and the receipt by the plaintiffs would be evidence of appropriation by defendants and of plaintiffs' consent, and the property would have passed, and any one taking that property out of Nixon's possession without the consent of the plaintiffs would get no title to or property in the goods. Then the plaintiffs, independent of the consent of Stephenson, Nixon & Co., if they had not a lien on it, would be entitled to possession of the goods. Admittedly plaintiffs never got actual possession, nor did Stephenson, Nixon & Co.; as the latter never had actual possession, plaintiffs could not have had constructive possession through Stephenson, Nixon & Co. Constructive possession takes place only when the owner entitled to possession of property is not himself in actual possession, but the property is in the possession of an agent or depositary for and on behalf of the owner or person entitled to the possession. Apart from this, if Stephenson, Nixon & Co. had 600 tons in their possession, the 500 tons were not identified or ascertained, and therefore no property passed. It is not necessary to consider the further question arising on plaintiffs' right to see that the goods were average quality of the season, or the right of survey. A very singular

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feature in this case is that neither defendants or Stephenson, Nixon & Co. ever had the property in or possession of any 500 tons. They merely had executory contracts for the sale and delivery of 500 tons not completed, and neither of them could give property or possession which they had not. The contract with the plaintiffs never was completed or performed by the defendants by giving the property in or the possession, actual or constructive, to the plaintiffs, if the above views are correct; and on this ground plaintiffs are entitled to a decree. But the defendants contend that by giving to the plaintiffs the delivery order, who accepted it, and by the acknowledgment of Stephenson, Nixon & Co. to the plaintiffs, the defendants passed to the plaintiffs the property in the 500 tons, and also constructive possession, and that the plaintiffs are thereby discharged from further performance of this contract. The terms of the delivery order are: "Please hold at the disposal of Messrs. Parry & Co. 500 tons of palmyra jaggery purchased by you on our account, which we learn from your telegram of to-day's date are now ready in godown. Messrs. Parry & Co. will instruct you direct regarding shipment." Now the express terms of the delivery order state that the defendants learn that the goods are in godown. Plainly the defendants and the plaintiffs then believed that the goods were then in the possession of Stephenson, Nixon & Co. The delivery order directs Stephenson, Nixon & Co. to hold the goods at the disposal of the plaintiffs. How could Stephenson, Nixon & Co. do so unless they had possession? This delivery order is nothing more than the very usual order given by an owner of property to his agents, who has possession of it, to deliver it to or hold at the disposal of a third party. The owner has not the actual possession, but another person has for him, and for convenience sake the party with whom the owner deals, accepts the delivery order on the agent, who is to give possession instead of requiring the owner himself to do so. As the owner is not in actual possession, nor is his agent's possession actual or constructive, it cannot be delivered at all. The delivery order therefore is inoperative. The agent or depositary to whom the delivery order is given, cannot give what he has not got. If the possession by Stephenson, Nixon & Co. was immaterial or unnecessary, as contended by defendants' counsel, why were the defendants so careful to state in

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the order that they learn "from to-day's telegram the goods were ready in godown," clearly meaning, in possession of Stephenson, Nixon & Co.? No witness examined stated that he ever knew a delivery order given when the goods were not in possession of the party on whom the order was given. If plaintiffs and defendants knew the real fact that Stephenson, Nixon & Co. had not possession of the goods, is it probable the delivery order would ever have been offered or accepted? It is of the essence of a delivery order that the person on whom it is passed should be in actual possession of the goods mentioned in the order; what is its value as an authority to deliver if there is nothing in possession to deliver? It cannot be acted on. In *McEwan* v. *Smith*(1) the subject of delivery order was discussed, and it was held that an order for delivery of goods by an owner to his agent, who was not in the actual possession of the goods, though the latter accepted the delivery order, did not complete an executory sale by delivery of constructive possession, or take the goods out of the possession of the unpaid vendor, in whose name they were warehoused. There Smith was the owner of sugar warehoused in Little & Co.'s warehouse in the name of J. and A. Smith as received from James Alexander. Alexander was an agent for Smith, who afterwards sold the sugar to Bowie & Co., to whom a delivery order was given addressed to Alexander: "Please deliver to the order of Messrs. James Bowie & Co., the undernoted 42 hogsheads of sugar *ex St. Mary* from Jamaica in bond." Bowie did not present the delivery order, and Alexander informed Smith of the fact. On the 25th September McEwan & Co., to whom Bowie sold the sugar, presented at Alexander's office the original delivery order transferred by Bowie, and an entry was made in Alexander's book, "Delivered to the order of McEwan and Sons this date 42 hogsheads of sugar *ex St. Mary*. James Alexander *per* J. Adams." Afterwards, on the same 5th September, Alexander, under order of Smith, who heard a rumour of Bowie's failure, caused the goods to be removed to Kerr's warehouse; on the 27th of September the removal was complete.

The plaintiff brought suit against Smith to recover, and the case was heard on appeal by the House of Lords. It was con-

(1) 2 H.L., 309.

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tended that a delivery order acknowledged by a warehouseman is a complete transfer of the property. It was ruled that the transfer order did not pass property, like a bill of lading endorsed. It was further contended that the delivery on the 25th September of the delivery order to Alexander operated to take the goods out of the possession of the defendants. It was held, however, that Alexander was only agent for Smith, and the goods were in the warehouse of Little, with whom they remained on the 25th of September. It was argued that the possession of the goods was changed by what took place with Alexander on the 25th of September. But the Lord Chancellor (Lord Cottenham) said: "It is clear to my mind that Alexander was not in actual possession of the goods, and what he did at that time could not change the possession. He was only agent of the vendors, and was so named in the books of Little & Co." Lord Brougham said: "Alexander was not in *custody* of the goods; he was not authorized to deal with them in any way." Lord Campbell said: "Alexander was not on the 25th of September in custody of the sugar; he was the mere agent of the owners; he was not the warehousekeeper of the owners, and the goods were not in his possession, but in the custody of the warehousekeeper, who alone could actually change the possession, and therefore the very foundation for the argument as to change of possession fails."

In *Bryans* v. *Nix*,(1) it will be recollected Parke, B., referring to the boat receipt (No. 54), said it had nothing to operate on. None of the goods were on board. So the acknowledgment of Stephenson, Nixon & Co. had nothing to operate on as they had not the 500 tons in their possession. Therefore the delivery order acknowledged by Stephenson, Nixon & Co. was inoperative to pass either property in, or constructive possession of, the 500 tons to the plaintiffs, and in this view the defendants had not performed their contract with the plaintiffs. There was no objection in point of law to parties—say, the plaintiffs and defendants here—making an agreement if they so thought fit, on the footing that Stephenson, Nixon & Co. had not the possession of the goods, but expected to have possession, and that when they obtained possession plaintiffs were then to obtain from them possession. But

(1) 4 M. & W., 775.

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this is not the agreement plaintiffs and defendants made. The agreement stated that the goods were then in godown, ready and held by defendants. Again, there would be no objection in point of law if the plaintiffs and defendants, with the assent of Stephenson, Nixon & Co., agreed that the defendants' contract and liability should be assigned by them to and accepted by Stephenson, Nixon & Co., thus substituting the latter for the defendants. But this was not done. This is in effect what I am asked (by counsel) to believe was done. There is no evidence whatever of such agreement in fact. But I am asked to construe the delivery order and the acceptance of it, and the acts of the plaintiffs thereunder, as amounting to such an agreement. It is impossible for me to do so. The proposal of the defendants by the delivery order and the accompanying letter is merely in reference to the delivery by Stephenson, Nixon & Co. of the goods, and that they should attend to plaintiffs' order as to shipping. The order and letter treat Stephenson, Nixon & Co. as then being defendants' agent having possession, and not as a person to whom the contract and liability of the defendants was to be assigned; not a word is said referring to an assignment of defendants' contract and liability to Stephenson, Nixon & Co., or to substituting them for the defendants or discharging them from liability, and no such proposal was assented to by Stephenson, Nixon & Co. There was no reason why the plaintiffs should be asked to depart from the original contract, or why they should do so; they got no consideration or benefit by so doing. The defendants were bound and willing to fulfil their contract. The quality of the goods had to be verified with the description in the contract, and if they turned out not of the quality, plaintiffs might reject them or claim reduction. Then the defendants were bound to pay the cost f.o.b., that is, of putting the goods on board (between 2,000 and 2,500 rupees according to Nixon's evidence). The agreement suggested by defendants does not provide for any of these circumstances. But it is argued that Stephenson, Nixon & Co. were, by their contract with defendants, bound to deliver f.o.b., and they would have to pay the charge, f.o.b., as between them and defendants. But the defendants did not inform the plaintiffs that Stephenson, Nixon & Co. were so bound to the defendants. Nothing was written or said on the subject between plaintiffs and defendants, and plain-

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tiffs were not aware that Stephenson, Nixon & Co. sold the goods to the defendants. One would expect an agreement to transfer the defendants' contract would have referred to all these matters. Then it is said that all goods sold on the East Coast for export are sold f.o.b., and that plaintiffs, who traded in that market, should be held to trade subject to that custom. But the evidence does not exclude the making of a contract, even on the East Coast, except f.o.b. Moreover, the delivery order treats the 500 tons in terms as purchased for or on account of defendants, *i.e.*, for them. I may mention here that Mr. McLintock and other witnesses were asked, on reading the delivery order, to say who, according to any mercantile custom, should pay the charge of putting on board. He said that if Stephenson, Nixon & Co. were treated as the sellers to the defendants, then Stephenson, Nixon & Co. should pay the charges; but if Stephenson, Nixon & Co. are not treated as such sellers to defendants, the defendants should pay.

Now here the plaintiffs knew nothing of Stephenson, Nixon & Co. having been defendants' vendors, and therefore that fact does not enter into the consideration as between plaintiffs and defendants. On the question of who, according to custom, was bound to pay the charges, I may mention here that Mr. Arbuthnot and other witnesses were asked Was there a custom on the coast and in Madras to deliver possession of goods by delivery orders? To which their answer was Yes. (I think it is a universal usage of trade.) But no witness said it was the custom to do so when the goods were not in possession of the vendor. No reliable evidence was given of any custom such as alleged in the fourth paragraph of the plaint, viz., that when a delivery order is given and accepted, the giver is discharged from all liability, and the persons on whom the order is given is substituted for the giver in such a contract as this.

It is argued that as Stephenson, Nixon & Co. accepted the delivery order, they were estopped from denying, as against the plaintiffs, that they had the possession of the goods, and the case of *Knights* v. *Wiffen*(1) was cited on this point. There is no doubt that this is so in the case of a holder of goods or other persons in possession of them, who attorn to a third party under a

(1) L.R., 5 Q.B., 660.

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delivery order from the owner of the goods, and Stephenson, Nixon & Co. may be treated as estopped as regards the plaintiffs. From this it is argued that Stephenson, Nixon & Co. were discharged as against the defendants, who could not maintain an action for non-delivery to them. I am unable to agree to this latter proposition, recollecting that it was the wilfully untrue and therefore fraudulent misrepresentation of Stephenson, Nixon & Co. of possession by them to the defendants that induced the defendants to make the incorrect representation to the plaintiffs that Stephenson, Nixon & Co. had such possession. But even if the defendants lost their remedy against Stephenson, Nixon & Co. by reason of the estoppel binding them as regards plaintiffs, I am unable to see how the plaintiffs can be affected by such circumstances. The defendants chose to trust to the representations of Stephenson, Nixon & Co., whether the latter were their agents or not; and on their own responsibility, both in the delivery order and in the letter of the same date accompanying, represented to the plaintiffs, as the basis of the delivery order, that Stephenson, Nixon & Co. had then possession of the goods in godown. On this representation the plaintiffs acted; how then can the defendants set up an incorrect representation of their own (take advantage of their own wrong), or the consequence of that representation, to the prejudice of the plaintiffs? In my judgment they cannot; for two reasons the delivery order cannot be set up against plaintiffs—first, that the representation was the basis of the contract in the delivery order, though made under a mistake by defendants, *Behn* v. *Burness*(1); second, there was a mutual mistake, and the contract was voidable (Benjamin, p. 323; Contract Act, s. 18).

Again it is said that after the acceptance of the delivery order some time in June, the defendants paid Stephenson, Nixon & Co. Rs. 1,000, the balance due to them on a purchase of 1,000 tons of jaggery including the 500 sold to plaintiffs, and also advanced to Stephenson, Nixon & Co. Rs. 25,000 on other accounts, which they would not have done if they were informed by the plaintiffs that Stephenson, Nixon & Co. had not possession of the 500 tons of jaggery. The answer appears to me to be this, that

(1) 3 B. & S., 751.

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the loss, if any, sustained by the defendants, is not caused by the omission by plaintiffs to do any act they were in duty bound to towards the defendants. Plaintiffs relied on defendants' delivery order and letter; plaintiffs did not owe any duty to the defendants to discover whether the representation of either Stephenson, Nixon & Co. or the defendants was true or not. It was the duty of the defendants to see that their own representation was correct, and that the representation of Stephenson, Nixon & Co. was correct. The loss to the defendants is the result of their own confidence in Stephenson, Nixon & Co. and want of care of their own interest. The plaintiffs, who also placed confidence in Stephenson, Nixon & Co., are so far in the same position, and I do not see why defendants should be excused for placing confidence in Stephenson, Nixon & Co. and the plaintiffs not so excused. Stephenson, Nixon & Co. were under contract, no doubt, with plaintiffs for 400 other tons of jaggery to be delivered, but they (Stephenson, Nixon & Co.) were under contract to deliver the 500 tons for plaintiffs, and 500 tons besides to defendants. Moreover, the defendants had other large contracts with Stephenson, Nixon & Co., in respect of which—so great was defendants' confidence—they paid Stephenson, Nixon & Co., according to Mr. Turnbull's evidence, Rs. 25,000 in June. It is said plaintiffs did not enquire after the 6th of May whether Stephenson, Nixon & Co. had the jaggery ready; why should they? Already they were informed so. But plaintiffs were in constant conversation with Stephenson, Nixon & Co. by telegram and by letter; see ex. L, M, Nos. 1 and 13, if that is of any importance. It is also argued that the loss to the defendants, as above mentioned, was caused by the neglect of the plaintiffs to supply a ship by the 31st of May to take the 500 tons on board. The argument is that if the ship arrived in due time, then it would have been discovered that Stephenson, Nixon & Co. had not the goods to deliver, and defendants could then have compelled Stephenson, Nixon & Co. to deliver, and would not have paid them the large sum which they did. This argument as regards compelling delivery is inconsistent with the prior one for defendants, in which it is maintained that the defendants were discharged from liability, and Stephenson, Nixon & Co. substituted by virtue of the delivery order and of its acceptance; and as regards the payment of the sums of Rs. 7,000 and 25,000, such

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loans cannot be in any way held to be connected with defendants not supplying the ship by the 31st of May, however remotely; but even if remotely, such loss should be held to be too remote, and I need not notice this part of the alleged loss further. Assuming, for argument, for the present that the plaintiffs were bound to have had the ship ready by the 31st of May, and that plaintiffs are open to the allegation of laches in that respect, it is necessary to see whether Stephenson, Nixon & Co. were, after the 31st of May, in a position to supply 500 tons of jaggery, recollecting their obligation to deliver other jaggery, viz., 400 tons to the plaintiffs and 500 tons to the defendants, in all 1,400 tons. Upon the evidence it appears that Stephenson, Nixon & Co. had contracted with Phillips for the purchase of 600 tons (paying 10 per cent. on account), to be delivered in the end of June. Phillips had not possession of the jaggery if he had bought it from Gopalan, who again, as unpaid vendor, had mortgaged it to Messrs. Binny & Co. and Innes & Co. Gopalan says he could have got that or other jaggery and given possession to Phillips or to Stephenson, Nixon & Co. on payment. The amount does not appear clearly, but it was at all events Rs. 30,000 to 40,000. Further, Stephenson, Nixon & Co. had contracted to buy 700 tons from Ramakrishnaya for delivery in the end of June, and he had only possession of 300 tons ready by the middle of June, and this was not paid for and would amount to about Rs. 20,000. Further, Stephenson, Nixon & Co. had contracted to purchase 200 tons from Gill, Deane & Co., for delivery at the end of June, which probably might have been got on payment of Rs. 15,000 or so. The probability is that if Stephenson, Nixon & Co. were pressed to deliver the 500 tons sold to plaintiffs by defendants, they would have been also pressed to deliver the 400 tons to plaintiffs and 500 to the defendants. If so, Stephenson, Nixon & Co. could not, I am inclined to believe from the evidence, have supplied 1,400 tons, and paid therefore a sum of probably Rs. 60,000 to 70,000 to obtain the goods, in their circumstances. No doubt they had large credit in June with the Madras Bank, and drew in January Rs. 60,000 or 70,000 within a few days, but on the 14th of June their credit was temporarily stopped by the Madras Bank until Ramakrishnaya guaranteed a large debt for them. Their account with the Chartered Mercantile Bank, it appears in the proceedings in insol-

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vency filed in this matter, was then overdrawn. Though these receipts were large, their payments were up to the same amount; their debts remain. The conclusion I arrive at is, that if Stephenson, Nixon & Co. had been pressed at any time after the 18th of May to deliver the 500 tons sold to plaintiffs—taking into consideration the necessary consequence that plaintiffs and defendants would also press for their other goods—Stephenson, Nixon & Co. could not deliver the 500 tons or pay the market value, but would have submitted to insolvency. When Stephenson, Nixon & Co. failed, only 800 tons of jaggery could be found ready to be delivered to Stephenson, Nixon & Co. in the fulfilment of contracts made with them, and except 10 per cent. paid to Phillips, the whole 800 were unpaid for and in the hands of the sellers to Stephenson, Nixon & Co., who never had possession, actual or constructive, of any part of it.

On the seventh issue, the question was raised by the defendants at the hearing, whether the plaintiffs were entitled to maintain this suit while their own side of the contract was not performed, inasmuch as they did not supply a ship by the 31st of May. The defendants' counsel contends that it was a condition precedent or concurrent to the delivery of jaggery f.o.b. in the contract between the defendants and plaintiffs that the latter should have a ship ready to receive the jaggery on the 31st of May. *Bowes* v. *Shand*(1) was cited. The facts of that case were quite different from those of this case. The point decided then was not decided for the first time, but the question was the application of well-known principles to the facts. These principles are that the construction of a contract, unless affected by a custom of trade, is for the Court, and that the words must be construed according to their plain ordinary sense.

There the agreement was to ship rice at Madras in March or April. Some of the goods were shipped before March, and it was held that the contract meant the whole of the goods were to be shipped in March and April, and therefore the purchaser was not bound to accept delivery. *Reuter* v. *Sala*(2) was also cited. In that case, the contract for October and November for pepper bound the plaintiffs to declare within sixty days from bill of lading the

(1) L.R., 2 App. Ca., 455. (2) L.R., 4 C.P.D., 239.

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name of the ship and marks. Five tons were shipped in December, therefore not according to contract. It was held that time was of the essence of the contract, and defendants might repudiate it. The universal rule in considering contracts, if in writing, is according to the language used, and the intention of the parties as expressed by them. Where the whole of a contract is not in writing, then the intention and agreement of the parties is to be made out partly by the writing and partly by evidence, so far as evidence is not in conflict with the writing. See what the contracts were. Defendants sold and plaintiffs bought 500 tons jaggery, fair average of the season, f.o.b. at Cocanada; delivery, say May; terms, full advances, exchange $\frac{3}{4}$. That is all the writing. It is agreed that the defendants were to supply the ship.

If the delivery was by the terms of the contract to be made on board a ship before the end of the 31st of May, then, as the plaintiffs were to provide a ship, the presence of the ship at Cocanada before the end of the 31st day of May would be a condition precedent to the shipping on the 31st of May; otherwise the defendants could not deliver and the plaintiffs would have broken their contract. This would appear to come within s. 54 of the Contract Act and the second rule stated in the notes to *Pordage* v. *Cole*(1), and which are also referred to in 2 Smith's L.C. in the notes to *Cutter* v. *Powell*, p. 12. But rule 3 provides that when the promise goes only to part of the consideration, and a breach thereof may be paid for as damages, it is an independent covenant or promise. See *Franklin* v. *Miller*.(2) *Boone* v. *Eyre*(3) referred to in *Franklin* v. *Miller*. Lord Mansfield says: "The distinction is very clear, when mutual promises go to the whole consideration on both sides. They are mutual conditions one precedent to the other. If they only go to part of the consideration when the breach may be paid for in damages, the defendant has his remedy on the covenant or promise, and shall not plead it was a condition precedent." (See this principle fully discussed in *Behn* v. *Burness*(4), Benjamin on Sales, Bk. IV, Part I.)

Now here the promise of the plaintiffs to have the ship ready to take the goods by the 31st of January did not go to the whole

(1) 1 Wm. Saund, 548.
(2) 1 H.Bl., 473.
(3) 1 H.Bl., 273, n.
(4) 3 B & S., 751.

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SHAW v. BILL.

consideration, for the rest of the consideration was the payment of the price in advance. Therefore the promise in the case was an independent contract, and the plaintiff may maintain his suit against the defendants for their breach of contract, and the defendants may have a remedy by action against the plaintiff for that breach of the contract. But if plaintiffs' contract came within s. 55 of the Contract Act and is a contract to supply a ship by the 31st May, still, on looking to the whole contract, I do not think that time, as regards the supply of the ship, was of the essence of the contract (for reason see afterwards in referring to the evidence of witnesses); therefore the contract was not voidable. But there is another well known rule of law, that where the performance of the promise of one party is a condition precedent to the promise of another, if the latter has received substantial portion of the consideration, or part performance of the promise, he cannot set up the condition precedent as a defence (Benjamin, Bk. IV, Part I; Chitty, 671-2; and *Behn* v. *Burness, supra.*) Here defendants received the full purchase money, therefore the objection that this suit cannot be sustained when the promise of the plaintiffs to supply a ship at a particular time has not been performed, is not good. I do not find that this point is expressly included in the Contract Act, but it is not, I think, excluded. S. 51 of the Contract Act applies to this case, as the defendants were not ready to perform the promise to deliver on 31st of May, assuming the purchases were to be performed simultaneously. Independent of the above views, there is distinct evidence of merchants that in respect of such a contract as in this case, time for supplying the ship is not, according to mercantile custom, of the essence of the contract, as the seller has been paid in full, and, after the expiration of the time limited for performance of the contract, the goods, if ready, will remain at the risk of the vendee, who has the option either to take delivery on shore, receiving refund of the ordinary charges to put f.o.b., or he may require the goods to be put on board, he paying all warehouse rent and all charges caused by his being late with the ship. But the goods should be ready at the time limited. Mr. Turnbull, one of the defendants, said that the absence of the ship for some reasonable time after the limited time would not cause any difficulty according to his experience, but the goods should be ready for delivery at the time. The result is

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that the time for the supply by the plaintiffs of the ship is estimated to be a reasonable time after the limited time. Instances were given by one witness where the ship did not arrive until after six weeks, and that such delay was not unreasonable. The substance of the reason is sound, viz., it is immaterial to the seller, as his goods were ready in time and he has been paid; he runs no risk, as the risk is on the vendee after the limited time. In this case, therefore, when the ship arrived on the 17th or 18th of June, I hold that the plaintiffs supplied within reasonable time, and that the objection to the plaintiffs' suit on the ground of delay is not good.

As to damages, the ordinary rule where a vendor has failed to supply goods and the vendee has not paid beforehand, is to give the vendor the difference between his contract price and the market price on the day of breach, as he is supposed to have his money to be able to purchase in the market. But when a vendee has paid in advance, as his money is already paid, he is entitled to a reasonable time after the breach to prepare to purchase other goods.

I do not see that plaintiffs should be allowed commission to their agents, Messrs Simpson & Co., as against the defendants as part of the damages. It was contended by counsel for the defendants that, by their letter of the 29th of June, they had rescinded the contract. If they were entitled to do so they should abide the consequences, which under s. 64 of the Contract Act would be to repay to the plaintiffs the amount of the advance. This is the lowest right the plaintiffs could claim, but, as I have above stated, the defendants are not entitled to avoid the contract.

Being of opinion that the contract of the parties did not make time the essence of the contract for the plaintiffs to supply the ship (and the evidence as to custom supporting this view), I do not see that any loss was caused to defendants by the absence of the ship from the 31st of May. The damages that defendants may have to pay in this action are not loss by reason of the delay of plaintiffs in providing the ship, and no other loss is suggested. Upon the whole, I think:

1. No property in the goods ever passed, as no goods were appropriated to the contract.
2. The delivery order was inoperative as Stephenson, Nixon and Co. had not possession of the goods; plaintiffs never received either actual or constructive possession of them.

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3. The defendants were not ready to deliver the 500 tons of jaggery on the 31st of May or any time after that, and defendants refused by their letter of 29th June to do so.

4. There was no discharge by the plaintiffs of the defendants' liability to perform the contract, nor were Stephenson, Nixon and Co. substituted in the contract for the defendants.

5. The plaintiffs are not prevented from bringing this action by reason that they did not supply the ship by the 31st of May.

6. Plaintiffs paid Rs. 43,684-10-10 contract price given to the defendants, and they are entitled to the price of the market on 500 tons within a reasonable time after the 29th of June, that is, the price on the 1st of July, which it may be assumed was the same as it was on the 22nd of June, Rs. 19-8 per candy, and local exchange.

Decree for Rs. 44,023-0-8 and costs, and interest on debt and costs at 6 per cent.

Solicitor for plaintiffs: *Wilson.*

Solicitors for defendants : *Barclay & Morgan.*

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. October 14.

KANDU (PLAINTIFF), APPELLANT,

and

KONDA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 57—Suit filed in wrong court—Return of plaint.

In a suit filed in a District Múnsif's Court to recover certain land, the defendants alleged that the value of the land was understated by the plaintiff and exceeded by far the pecuniary limit of the Court's jurisdiction.

Upon enquiry the Múnsif found this allegation to be true and directed the plaint to be returned to the plaintiff for presentation in a superior Court.

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* Appeal 33 of 1884.

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The plaint having been presented in the Subordinate Court, the Subordinate Judge, on the authority of *Jagjivan Jáverdhás Seth* v. *Magdum Ali* (I.L.R., 7 Bom., 487) dismissed the suit.

Held that the procedure adopted by the Múnsif was correct.

THIS was an appeal from the decree of E. K. Krishnán, Subordinate Judge at Calicut, dismissing a suit brought by Kandu Paniker, Karnavan of the Mannathúr tarwad, against Konda Paniker and two other members of the tarwad.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (TURNER, C.J., and MUTTUSÁMI AYYAR, J.)

Sankaran Náyar for appellant.

Sankara Menon for respondents.

JUDGMENT.—The plaintiff claimed a declaration of his right, as karnavan of a tarwad, to the exclusive management of its properties, and for an injunction restraining the defendants, who, he alleged, were anandravans, from interfering with the management, and for an order directing the delivery to him of certain property appertaining to the tarwad which he alleges is in their possession. The plaintiff valued the suit at Rs. 1,746-15-5 and filed his plaint in the Múnsif's Court. Exception was taken to the jurisdiction on the ground that the value was under-estimated.

A commissioner was appointed to make a valuation of the property in the possession of the anandravans; he reported that the value was Rs. 6,400.

The Múnsif accepted the commissioner's valuation, and, holding that the value of the subject-matter was in excess of the pecuniary limits of his jurisdiction, returned the plaint for presentation in a superior Court. The Subordinate Judge, considering that the deficiency in valuation was so great as to disclose fraud on the part of the plaintiff, and that the insufficiency of the value asserted had only been detected after investigation, held that the Múnsif should have dismissed the suit, and in support of his ruling he referred to *Jagjivan Jáverdhás Seth* v. *Magdum Ali*.(1) That decision has subsequently been overruled by a bench of three Judges at the same Court—*Prabhakarbhat* v. *Vishwambhav Pandit*,(2) who have decided the point in accordance with the decision in this

(1) I.L.R., 7 Bom., 487. (2) I.L.R., 8 Bom., 312

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KANDU v. KONDA.

Court—*Jivaraju* v. *Purushotam*.(1) The decree of the Subordinate Judge is set aside, and he is directed to try the suit on the merits.

The costs will abide and follow the result.

NOTE.—See *In re Bái Amrit*, I.L.R., 8 Bom., 380.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Brandt.

1884. Oct. 15, 21.

HANUMAYYA (PLAINTIFF), APPELLANT,

and

N. A. ROUPELL, PRESIDENT OF MUNICIPAL COMMISSION, ANANTAPUR (DEFENDANT), RESPONDENT.*

Towns' Improvement Act, 1871, *ss.* 138, 139—*Street—Encroachment—Possession—Private property*—Onus probandi.

H owned a house in the town of A, to which the Towns' Improvement Act, 1871, was extended in 1879.

In 1882 the Municipal Commissioners, professing to act under section 139 of the said Act, removed a pial which projected beyond the main walls of H.'s house and abutted on a lane which was used by the public.

H proved that the pial had existed for fifty years:

Held, that the action of the Municipal Commissioners was illegal.

THIS was an appeal against the decree of V. Gopal Ráu, Subordinate Judge of Bellary, confirming the decree of T. Rámáchandra Ráu, District Múnsif of Gooty, in suit 121 of 1883.

The facts and arguments in this case are set out in the judgments of the Court (Hutchins and Brandt, JJ.)

Hon. *Rámá Ráu* for appellant.

Bháshyam Ayyangár for respondent.

HUTCHINS, J.—The plaintiff owned a house in a small lane in the town of Anantapúr to which the Towns' Improvement Act, 1871, was extended in 1879. In front of this house were three pials and under one of them a cess-pool. The Municipal Commissioners resolved that these pials were "an obstruction or encroachment in a public street" within the meaning of section 139, and, after giving the notice required by that section, they caused the pials to be removed and the cess-pool filled up on the 25th October 1882.

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(1) I.L.R., 7 Mad., 171.

* Second appeal 538 of 1884.

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The plaintiff at once gave notice of suit to the defendant, the President of the Municipality, and in March 1883 he filed this suit to recover the ground occupied by his pials and cess-pool with Rs. 35 damages.

The encroachment, assuming it to be one, was in existence before the Act was extended to Anantapúr, and under section 139 the plaintiff was entitled to reasonable compensation. It was not, however, till the end of May 1883 that this compensation was fixed and Rs. 15 tendered to the plaintiff.

The District Múnsif found that the pials had been in existence for at least forty or fifty years, but that the ground below them was not proved to be private property, and that the contrary ought to be inferred from their projecting into the lane. It does not appear whether he meant that they merely projected beyond the main wall of plaintiff's house or beyond other adjacent houses. It is, however, stated that there are no pials projecting from the other houses in the lane, but that, nevertheless, the width of the lane was greater opposite the plaintiff's pials than in some other places. Finally the Múnsif held that section 139 covered the action of the Municipality, and that the Rs. 15 was reasonable compensation, though it might cost Rs. 20 or 21 to replace the pials; and he gave plaintiff a decree for Rs. 15 only, but directed the defendant to pay his costs on account of the delay made in settling the amount of compensation.

On appeal by the plaintiff, the Subordinate Judge held that the burden of proof had been wrongly thrown on the plaintiff; that it was not incumbent on him to prove how the land was acquired by his ancestors; that, in the absence of any evidence that the ground belonged to the public, and in view of the plaintiff's long enjoyment, it was "beyond all doubt the private property of the plaintiff." He, nevertheless, held that the Municipality were empowered by section 139 to remove the pials as obstructions to the public, and he dismissed the appeal with costs, disallowing also the defendant's objections as to damages and costs.

The plaintiff has now appealed to this Court, and it is conceded by the respondent that, if the Subordinate Judge was right in finding that the ground was the private property of the appellant, he was wrong in holding section 139 applicable. That section and the one preceding it deal with obstructions or encroachments in a

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HANUMAYYA v. ROUPELL.

public street : the wall must be built, or the fence erected, or the other obstruction or encroachment made to exist, *in the street.* The interpretation clause defines "a street" and the definition makes it to comprise (1) a roadway over which the public have a right of way, together with (2) such land (not being private property), whether covered or not by a pavement, pial or other structure, as may be between the roadway and the main wall of any house adjacent thereto. The very terms of the definition exclude ground which is private property. If, therefore, the Subordinate Judge was right in finding that the soil under the pials was vested in the plaintiff as private property, there was no obstruction erected *in the street*, and section 139 did not empower the Commissioners to interfere. Their proper course, if they wished to widen or straighten up the lane at that particular spot, was that indicated by sections 18 and 19 of the Act—to take up the ground under the Land Acquisition Act.

The respondent, however, seeks to support the Subordinate Judge's decree by showing that he was wrong in holding the ground to have been the appellant's private property. The argument is that under the definition, "a street" must be presumed to comprise all the ground between the main walls of the houses abutting on the roadway, and that these pials, projecting beyond the main wall of the appellant's house, must be presumed to be part of the street unless they are proved to have been built on private land. In other words, it is contended that the onus of giving complete proof must always lie on the person claiming to retain such projections.

It seems to me that this proposition cannot be supported. The rights of the Commissioners over the streets of the town are given them by section 13 of the Act, which says that "all public streets (not being private property) existing at the time this Act comes into operation . . . . . shall vest in and belong to the Commissioners and their successors." It lies on the Commissioners, who have assumed the right to interfere with pials which were *primâ facie* in the plaintiff's possession as his private property, to justify their action by showing that they were not really private property. If they had proved that the lane in question was used as a lane before the pials were built, it is possible that this might have been sufficient to shift the burden of proof on to the appellant, and the question would then have arisen, since appellant admits he

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cannot prove a title otherwise, whether he had made out a title by prescription. But the Commissioners have not established anything beyond the bare fact that the public use the lane. The appellant's house may have been the first built in that locality, and the lane may have been formed by others building opposite it. In my judgment it was not incumbent on the appellant to make out more than a *primâ facie* case, and I am of opinion that he has done so. He has proved that the pials were in existence beyond living memory, for forty or fifty years at least, and I agree with the Subordinate Judge that this is quite enough, in the absence of any kind of evidence on the other side. The District Múnsif inferred that the appellant had encroached on the lane because the pials were projections, but I have already mentioned that there are no other pials in the lane, and that, nevertheless, it was narrower in some other parts than opposite the appellant's house. In my judgment, therefore, there is no foundation for any such inference.

The decrees of the Lower Courts must be reversed with costs throughout. It is probable, however, that the Commissioners may elect to take action under sections 18 and 19, and it will be convenient that time should be reserved for this purpose before the land is restored or steps taken to rebuild the pials. The decree will be that, after the expiration of six months from this date, the defendant do restore to the plaintiff the land sued for and pay him Rs. 21 as damages, unless the acquisition of the land by the Municipality and the payment of compensation to the plaintiff shall have been otherwise arranged, and that in any case the defendant do pay to the plaintiff his costs throughout.

BRANDT, J.—Municipal Commissioners are empowered under section 138 of Madras Act III of 1871 to remove "any obstruction or encroachment in any public street" within municipal limits, without payment of compensation in the case of obstructions or encroachments made or created after the Act has come into operation in any town; and under section 139 to remove such obstructions or encroachments erected before the introduction of the Act, upon payment of reasonable compensation.

There is a concurrent finding by both the Lower Courts, and indeed it does not seem to have been denied by the respondent, that the ground on which the pials, removed under the respondent's orders, stood, and the pials thereon, had been in existence and in

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the possession and enjoyment of the appellant for at least forty or fifty years before they were so removed.

The District Múnsif decided the case against the appellant on the ground it was not proved by him that the ground on which the pials stood was his private property, and that as these structures "projected" into the lane (some four feet in width or less in the widest part) along which it was not denied that there was a public right of way for foot passengers and cattle, it must be inferred or presumed that the appellant had encroached upon the lane.

The Subordinate Judge held, on the contrary, that proved or admitted long possession and enjoyment by the appellant threw upon the respondent the burden of proving that the space occupied by the pials was not the "private property" of the appellant, and that the respondent failed to prove this, but that the action of the President and Commissioners was justified, as the existence of the pials was beyond question "an obstruction to the public."

Against this decision appeal is preferred, and it is conceded on behalf of the respondent that, if the Subordinate Judge was right in law in holding that long possession and enjoyment throws upon the respondent the burden of proving that the space occupied by the pials was not private property, then the action of the President and Commissioners cannot be supported; but it was contended that, having regard to the definition of "street" in section 2 of the Act, the burden of proving that any land or space outside the main wall of any building fronting a street and intervening between the roadway proper and such main wall is private property, rests upon the owner or occupant of such house or other person claiming the same.

The word "street" is, for the purposes of the Act, thus defined in Madras Act III of 1871:—

"The word 'street' shall mean any road, street . . . . . alley or passage, whether a thoroughfare or not, over which the public have a right of way, together with such land (not being private property), whether covered or not by any pavement, pial, verandah or other erection or structure, as may be between the roadway and the main wall of any house or houses adjacent thereto."

With reference to the abstract proposition on which the ingenious argument for the respondent is based, it appears to me sufficient to

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say that the Act must be reasonably construed, and that this it cannot be unless regard be had to the following considerations. It cannot be doubted, I think, that in framing the definition above quoted, the Legislature had in view the case of there being some ground or space between the roadway proper and the main buildings on either or on one side of the roadway; but that there are or may be roads, streets and lanes between buildings on either side, in which there are no such spaces intervening between the roadway and the buildings, could hardly be denied; again, it is quite possible to conceive cases in which a right of way may have been acquired between, or passing by the side of, buildings, subsequent to the construction of such buildings, and it is not shown that the present is not such a case.

No evidence was adduced in this case on the side of the respondent to show the width or limits of that which is supposed to constitute the "street." And it would be altogether unreasonable to hold that Municipal Commissioners are at liberty to demolish a verandah, pial, or other structure forming a constituent part of a building past which there may be a right of way, on the simple ground that such pial or other structure is beyond the main wall of the house. There is no evidence, and, in my opinion, there is no presumption, that the pials were thrown out beyond the main building, upon what, at the time of the building of the house, was a public lane, or that they are not as much a constituent part of the house as the wall which they adjoin.

Having regard to all the facts of the case before us, I am of opinion that the finding of the Subordinate Judge was right in part, but that he ought to have held, and that we must hold, that it lay upon the respondent to prove that the space on which the pials stood was land which, not being private property, was a space not being part of the roadway proper, from which the Commissioners were, under section 139 of the Act, empowered to remove the pials erected thereon: and that the respondent failed to prove this. I am of opinion then that the decrees of the Lower Courts should be reversed and decree made in favor of the appellant in the terms proposed by my learned colleague.

NOTE.—See *Wedderburn* v. *Coopoosámi Sastriar*, Appeal 59 of 1876, reported in 1 Ind. Jur., 120.

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22 Calc. 291.
20 All. 4.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884. August 29. September 18.

BIYACHA

against

MOIDIN KUTTI.*

Criminal Procedure Code, section 488—Maintenance—Imprisonment for default of payment—Subsequent offer to pay—Sentence absolute.

A sentence of imprisonment awarded under section 488 of the Code of Criminal Procedure for wilful neglect to comply with an order to pay maintenance is absolute and the defaulter is not entitled to release upon payment of the arrears due.

In 1881, one Moidin Kutti was ordered by the Head Assistant Magistrate of Malabar to pay Rs. 8 a month to his wife, Biyacha, as maintenance. In July 1884, Biyacha having complained to the Deputy Magistrate (C. Kunhi Kannan) that maintenance had not been paid for nine months past, the Magistrate, under section 488 of the Code of Criminal Procedure, sentenced Moidin Kutti to suffer rigorous imprisonment for four and a half months for wilful neglect to comply with the order. On the 26th July, Moidin Kutti's brother presented a petition to the Deputy Magistrate offering to pay the arrears of maintenance and praying that Moidin Kutti might be released.

The Magistrate being in doubt whether he could release Moidin Kutti, a reference was made to the High Court by the Acting District Magistrate of Malabar (C. A. Galton) as follows:—

"The question is whether a person, committed to jail for non-payment of the maintenance ordered by a competent Magistrate, may be released when the arrears are paid, even though he has not served out the time of imprisonment awarded him. The imprisonment in such cases is, it appears to me, inflicted more as a punishment for contempt of the order passed, than for non-payment of the allowance. Nevertheless it was not, I think, intended by the Legislature that a man who disobeys an order of maintenance

* Criminal Revision Case 494 of 1884.

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should be treated more severely than one imprisoned for default of payment of fine, as in the latter case the delinquent is discharged as soon as the fine is paid. As, however, the question is not wholly free from doubt, I have thought fit to refer it for the orders of the High Court."

BIYACHA v MOIDIN KUTTI.

Counsel were not instructed.

The Court (Turner, C.J., and Hutchins, J.) delivered the following judgments:—

HUTCHINS, J.—The question is a difficult one, but we are bound to go by what the Legislature has said, and I am constrained to hold that, although the Magistrate is not bound to order the full term of imprisonment for which the defaulter is liable under section 488 of the Code of Criminal Procedure, yet whatever time is ordered must be served. The language of that section, and of the corresponding form in schedule V is very different from that employed in cases where the imprisonment is to cease on payment.

Generally, imprisonment awarded in terms as "in default of payment of a fine" terminates on payment or levy by process of law (section 68, Indian Penal Code). That is not the case here. Under section 250 of the Procedure Code, when compensation has been awarded to a complainant and "it cannot be realized," imprisonment may be awarded up to one month. The form of warrant in schedule V (XXX) adds the words "unless sooner paid," which seem to be implied in the words "it cannot be realized."

Under sections 123 and 124, a person required to give security for a period may be "committed to prison until such period expires, or until within such period he furnishes the security;" it is expressly added that the Magistrate may order his discharge if he thinks this can be done without hazard (cf. form XIII).

In default of a fine for contempt, imprisonment may be ordered for a month, unless such fine be sooner paid (section 480); but this comes under the general provision first noticed. Section 485 provides for imprisonment where a man refuses to answer questions, &c.; he may be imprisoned for a week unless he consents in the mean time.

Section 514 provides that, if a penalty under a forfeited bond be not paid "and cannot be recovered by attachment and sale," the obligor may be imprisoned in the Civil jail for six months.

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BIYACHA v. MOIDIN KUTTI.

From the Civil jail being selected, and from the words "cannot be recovered," I should be inclined to hold in such a case that the imprisonment was intended to cease upon payment. The corresponding form is XLVIII, and contains the words "whereas cause has not been shown why payment should not be enforced against him": the declared object, therefore, is to enforce payment.

But according to the wording of section 488 there need only be (1) a wilful neglect, (2) an unsuccessful attempt to levy by warrant. "After the execution of the warrant" the Magistrate may "sentence" to imprisonment for a month for each month's allowance remaining unpaid. The form of warrant (XL) mentions only the wilful disregard, and not the fact that the money cannot be recovered, as though the contempt were the chief thing in view; and the imprisonment is to "be carried into execution" absolutely.

TURNER, C J.—It is difficult to see what object the Legislature can have had beyond the enforcement of the payment unless it be to punish the husband for contempt of the order; but I am unable to say that the language of the Code warrants any other construction than that which has been adopted by my learned colleague.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884. October 29.

LAKSHMI (PLAINTIFF), APPELLANT,

and

CHENDRI AND OTHERS (DEFENDANTS), RESPONDENTS.*

8 C.W.N. 905
32 Cal. 265

Service tenure—Resumption—Notice.

Where land held on service tenure is resumable at the will of the grantor, the holder cannot be ejected before a reasonable notice to surrender the land has been given.

THE plaintiff, Mahárájá Sri Rájá Lakshmi Chellayamma Bahadur Gáru, Rání of Bobbili, sued to recover certain land from the defendants, Padala Chendri Náyudu and others.

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* Second appeal 611 of 1884.

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This land was the emolument of the office of revenue náyudu in plaintiff's estate, and was held by defendant No. 1.

The plaintiff alleged that defendant No. 1 failed to perform the duty to her satisfaction, and that she gave him notice to quit.

The other defendants were made parties to the suit as being in possession with defendant No. 1.

The defendants pleaded that the claim was *res judicata*, inasmuch as a suit in 1881 for the recovery of the land, brought by plaintiff against defendant No. 1, had been dismissed, and denied that there had been any default by defendant No. 1 in his duties.

The District Múnsif of Chicacole (C. Venkataratnam) dismissed the suit on the ground that plaintiff had not given a reasonable notice to defendant No. 1 to surrender the land.

On appeal, the District Judge of Ganjam (J. R. Daniel) was of opinion that notice was unnecessary, but confirmed the decree on the ground that the land was held on hereditary tenure of service and could not be resumed arbitrarily.

The plaintiff appealed to the High Court.

Anandacharlu for appellant.

Srirangácháryar for respondents.

The Court (Turner, C.J., and Hutchins, J.) delivered the following

JUDGMENT :—In the former suit brought by the plaintiff to recover possession of the same lands from the first defendant, plaintiff alleged that she had not consented to his appointment; that the appointment was illegal, and she was entitled to recover the lands. It was found that although the appointment by the Collector was *ultrâ vires*, yet the plaintiff had accepted first defendant's services and was estopped from contesting the validity of the appointment. It was consequently held that she had no right to resume the lands. The Múnsif stated that it was neither alleged nor proved that the plaintiff could resume at pleasure.

The plaintiff now, admitting that the defendant has been appointed, claims that she has a right to dispense with his services and resume the lands at pleasure. We hold that she is not prevented by the rule of *res judicata* from asserting this claim. The cause of action in the two suits is not the same. The right now asserted was not asserted in the former suit.

The Courts were then bound to dispose of the case on the

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LAKSHMI v. CHENDRI.

merits. It is admitted that the grant was made subsequently to the permanent settlement, and the Judge considers that he is entitled to presume, from the fact that members of the same family have been allowed to succeed to the tenure and to the office, that the grant was hereditary and is not resumable. A grant may be hereditary but, nevertheless, resumable if the grantor is at liberty to dispense with the services of which the performance is the condition of the tenure. It does not clearly appear from the facts stated by the Judge that the grant was hereditary. The proprietor appointed a revenue náyudu and set apart these lands for his remuneration. The subsequent appointments were made by the revenue officers, who, following the custom obtaining in respect to village offices, selected persons from the family of the original grantee. It was asserted in the former suit that the lands had been divided and held separately by the members of the family, which favours the view that the grant was hereditary. Nevertheless it may be resumable, and at present nothing has been found to warrant the conclusion that it is not.

Assuming, however, that the grant was not hereditary and was resumable, the plaintiff would not be entitled to dismiss the tenure-holder and resume the lands without reasonable notice—*Unide Rajaha Bommaraz Bahadur* v. *Pemmasawmy Venkatadry Náyudu*(1), and we agree with the Múnsif that reasonable notice was not given in this case. The respondent was at first required to surrender the lands immediately and next to vacate possession within five days, and this at a time when, according to the Múnsif's finding, he had expended money on their cultivation.

On these grounds we dismiss this second appeal with costs.

(1) 7 M.I.A., 146.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884
October 27.

13 Mad. 57.
13 All. 216.
26 Bom. 335.

SUBRAMANYA (PLAINTIFF), APPELLANT

and

SADASIVA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 45—Hindú Law—Suit for partition—Alienees made parties to suit—Onus probandi.

Where a suit was brought by a Hindú for partition of family property against his father, brothers, and fifteen others to whom, it was alleged, the father had improperly alienated numerous parcels of the said property at different times:

Held, that the better course was for the Court to have ordered, under section 45 of the Code of Civil Procedure, separate trials to be held in respect of each alienation.

In a suit brought by a Hindú to contest an alienation of family property made by his father, the onus of proving that the alienation is binding on the son lies upon those who claim the benefit of the alienation.

THIS was a suit brought by Subramanya Ayyan, *in formâ pauperis*, against his father, Sadasiva Ayyan, and twenty other defendants (1) to obtain by partition a one-sixth share in seventy-eight parcels of land alienated by defendant No. 1, from the defendants in possession thereof; (2) to set aside the right exercised by defendant No. 1 of superintending certain other land dedicated to charity by plaintiff's family and to establish plaintiff's claim to one-fifth share of such right and to recover possession of the said land from the defendants in possession thereof.

Defendant No. 1 virtually admitted the claim. Defendants Nos. 3, 20, and 21, sons of defendant No. 1, and defendant No. 2, son of a deceased son of defendant No. 1, did not contest plaintiff's claim.

The principal issue framed by the Subordinate Judge of Madura (East) (T. Ganapathi Ayyar) was "whether any and which of the debts for which the properties were alienated were

* Appeal 145 of 1884.

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SUBRAMANYA v. SADASIVA.

incurred for immoral and illegal purposes and whether any and which of the alienations are not binding upon the plaintiff."

In disposing of this issue, the Judge held that it was only by showing that the debts were contracted for immoral or illegal purposes that the plaintiff could claim exemption from the binding nature of the sales, and as plaintiff failed to adduce such proof, the issue was decided against him. The plaintiff's suit was dismissed, except as to item No. 16, a house site, as to which it was decreed that defendant No. 1 should deliver to plaintiff a one-sixth share thereof.

Plaintiff appealed to the High Court on the ground, *inter alia*, that the *onus probandi* was wrongly cast upon him by the Subordinate Judge.

Gópálácháryar for appellant.

Bháshyam Ayyangár for respondents.

The Court (Turner, C.J., and Muttusámi Ayyar, JJ.) delivered the following

JUDGMENT:—In order to ascertain whether the several alienations challenged by the appellant in this suit were binding on the sons of the first defendant who were not parties to them, it would have been better if the Subordinate Judge had, under the provisions of section 45, directed separate trials to be held in respect of the alienations made to each of the contesting defendants or the parties under whom they claimed.

The circumstances of each alienation might then have been more fully considered.

The Subordinate Judge has not, in our judgment, altogether apprehended the law respecting the burden of proof in such cases. *Primâ facie* a Hindú father is incompetent to make alienations of ancestral immovable property and his sons have a right to question those alienations when they are not made with their consent. Persons then, who claim the benefit of alienations, must show that the alienations were made for a purpose justifiable under Hindú law, or that they, in good faith, believed that they were made for such a purpose. Until a person claiming the benefit of an alienation has given some proof that the alienation is made for a justifiable purpose, or that he believed it to have been so, it is not incumbent on the Hindú son to prove that the purpose was not justifiable. If, on the other hand, a person claiming the benefit of an aliena-

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Subramanya v. Sadasiva.

tion shows that it was made for a purpose ostensibly justifiable, the Hindú son must show that the purpose was in fact not justifiable and that the person to whom the alienation is made was aware that it was not so justifiable. The alienations impugned are said to have been made to pay antecedent debts. If those debts were not incurred for immoral purposes, or if the person to whom the alienations were made had no reason to believe they were made for immoral purposes, then the alienations would be binding on the son under the Privy Council decision in *Girdharee Lall's case*.(1) If, on the other hand, the persons to whom the alienations were made were themselves the creditors, and it be shown that the debts were contracted for immoral purposes, then the alienations will not bind the sons. The issues which the Subordinate Judge framed appear insufficient to determine the rights of the parties, and, unless separate issues are drawn in respect of each alienation, it is impossible to avoid considerable confusion in their decision.

In respect of the properties as against the defendants Nos. 4 to 19 and the representative of the fifth defendant, who has died, we set aside the decree and direct a new trial.

The costs of this appeal to abide and follow the result.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

AVALA (FIFTH DEFENDANT), APPELLANT,

and

KUPPU AND OTHERS, (PLAINTIFFS), RESPONDENTS.*

1884. July 10. October 30.

12 Mad. 500.
22 do. 371.

Res judicata.

It is by the decree and not by the judgment that a question of *res judicata* must be decided.

In 1881 A sued K and others claiming a declaration of his title to certain land and an injunction against interference with his possession.

K claimed part of the land by purchase from M.

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(1) L.R., 1 I.A., 321; S.C. 14 B.L.R., 187.

* Second Appeal 311 of 1884.

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AVALA v. KUPPU.

The Múnsif decreed for A and this decree was confirmed on appeal by the District Judge, but in his judgment the District Judge recorded that K's claim was not adjudicated upon and that he should bring a fresh suit if he had any claim.

In 1883 K sued A to recover the land, which he claimed by purchase from M.

A pleaded that the claim was *res judicata* by virtue of the decree in the former suit. The District Múnsif and, on appeal, the District Judge held that the claim was not *res judicata* and decreed for K:

Held, on appeal to the High Court, that as no reservation was made in the decree of K's right to bring another suit, the plea of *res judicata* was good, but that, under the circumstances, an opportunity should be given to K to apply to the District Court to have the decree in the former suit brought into conformity with the judgment.

This having been done, the decree of the lower Courts was confirmed.

THE facts of this case appear sufficiently for the purpose of this report from the judgment of the Court (Turner, C.J., and Hutchins, J.).

Dunhill for appellants.

Rámánujachháryar for respondents.

TURNER, C.J.—The plaintiffs, Kuppu Náyakan and three others, claim a one-eighth share in the lands in question under a conveyance of October 1880 from fourth defendant, Marappan. Avala Nayakan, the fifth defendant, appellant, claims to have previously purchased the same one-eighth share and another, or one-fourth in all, from Peria Muttu Goundan and two others, defendants 1 to 3. In 1881, this fifth defendant sued the defendants 1 to 3, as well as the plaintiffs, to have it declared that the whole one-fourth had passed to himself, and that defendants 1 to 3 and plaintiffs might be enjoined against interference with his possession. A decree to this effect was passed by the Múnsif and this decree was affirmed on appeal.

The plaintiffs, however, seek to avoid the plea of *res judicata* by a reference to the appeal judgment, and this contention has been allowed in both the lower Courts. It is stated in that judgment that "if Marappan has any right, he must bring a separate suit; all that is now decided is that plaintiff purchased the plaint land from defendants 1 to 3 and obtained possession, and two years later was obstructed in his enjoyment by defendants 4 to 7."

It is by the decree and not by the judgment that a question of *res judicata* must be decided. The decree is the formal expression of the adjudication upon the right claimed; the judgment

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simply contains the grounds of such adjudication. In the former case this appellant claimed this identical one-eighth share as against the present plaintiffs, and they were bound to set up every defence on which they relied. The decree adjudicated that the share had passed to the appellant as against these plaintiffs and that decree was simply affirmed on appeal. The fact that Marappan was not a party can make no difference, because, upon plaintiffs' own case, his interest had been assigned to them before the former suit.

AVALA v. KUPPU.

As the case stands at present, therefore, the plea of *res judicata* must necessarily prevail, but under the circumstances, we think it right to allow the plaintiffs an opportunity of applying to the District Judge to amend his former decree, so as to bring it into harmony with his judgment. We do not understand how the Judge could reasonably have refused to adjudicate between the titles to Marappan's one-eighth share set up respectively by the contending parties before him; but, if he did so, he should have reserved the point in his decree.

The case will now stand over for six weeks.

On the 30th October the Court delivered the following judgment:—The decree having now been amended, the plaintiffs' claim is not *res judicata*. The claim has been rightly decreed, but we think each party should bear their own costs throughout and the decrees will be modified accordingly.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

THE OFFICIAL ASSIGNEE (PETITIONER), APPELLANT,

and

RAMALINGA AND OTHERS (CREDITORS OF THE INSOLVENT AMBA SANKAR DAVAI), RESPONDENTS.*

1884. October 27. November 11.

Insolvent Act, 11 & 12 Vict., c. 21, s. 19—Rule 14 of Insolvent Court—Official Assignee—Commission.

The right of the Official Assignee to commission under 11 & 12 Vict., c. 21, s. 19 does not arise until there are in his hands funds realized and available for distribution among the creditors. If at such time the adjudication is annulled the right to commission subsists.

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* Appeal 15 of 1884.

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Official Assignee v. Ramalinga.

This was an appeal from the order of Kernan, J., made in the Court for the Relief of Insolvent Debtors on the 18th August 1884.

The facts necessary for the purpose of this report appear from the judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.).

Mr. *Shephard* for appellant.

Mr. *Grant* for respondents.

The judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.) was delivered by

Turner, C.J.—One Amba Sankar Davai was adjudicated an insolvent on the 8th May 1884 and a vesting order made. A meeting of creditors was held on the 15th May 1884, and eventually on 29th May 1884 it was resolved that an application should be made to the Court to annul the insolvency in order that the insolvent might assign the assets to trustees to administer and distribute the estate for the benefit of creditors. There was some little delay in securing the assent of all the creditors and it was not until August 1884, that the order for the annulment of the adjudication and vesting order was actually made. Meanwhile, the Official Assignee had set himself to secure and realize the assets. He had collected some movable property and had taken steps to sell the immovable property. At the time the adjudication was annulled, he held in his hands a sum of money which, however, would not have been available for dividends, as it would have been exhausted in defraying the expenses incurred.

In his order annulling the adjudication, the learned Commissioner directed the allowance of, or payment to, the Assignee of all costs and expenses incurred by him in collecting and realizing the estate in excess of the cash in hand, but he refused an application by the Assignee to be allowed a commission at the rate of 5 per cent., or some other rate on the value of the estate that had vested in him.

The learned Commissioner held that the Official Assignee was entitled to his commission only when the proceeds of the estate were about to be distributed by the Assignee to creditors.

The 19th section of 11 & 12 Vict., c. 21 declares that the Official Assignee shall receive no other remuneration in the shape of commission or otherwise than "a fair remuneration out of the sum to be distributed as dividends." By rule 14 of the Insolvent Court, the remuneration of the Official Assignee was

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settled at a commission of 5 per cent. on the principal sum forming the proceeds of each estate distributable as dividends. (1)

It appears clear that the Official Assignee is not entitled under any circumstances to a commission on the value of the estate vested in him, nor can we hold he is entitled to a commission on the value of the estate collected by him. It was possibly the object of the Legislature to incite the Official Assignee to activity and economy in expenditure or collections by indicating as the fund from which he was to be remunerated only the sum, which, after realization and the satisfaction of the expenses of collections and the debts of secured and other preferred creditors, might remain in his hands available for distribution among the general body of creditors. Neither the Act nor the rule appear to have made any special provision for the remuneration of the Official Assignee in the event of the annulment of the adjudication. But it appears to us that the right of the Official Assignee to his commission arises when there are in his hands any funds realized and available for distribution among the creditors—when he is in fact in a position to declare a dividend, and that, if there had been such funds in his hands at the time an adjudication is annulled, he could not thereby be deprived of the commission he has earned, and that a deduction should be made of the commission as well as of the costs and expenses of realizing the estate. In this view effect is given to the language of the Act and of the rule, neither of which make the actual declaration of a dividend a condition precedent to the accrual to the Official Assignee of a right to remuneration.

But, inasmuch as it is admitted in this case that the cash in the hands of the Official Assignee will not do more than cover the expenses of realization, we see no reason to interfere with the order of the learned Commissioner and must dismiss the appeal, but, under the circumstances, without costs.

Solicitors for appellant: *Barclay* and *Morgan*.

Solicitor for respondents: *Wilson*.

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(1) Ordo Curiæ, 22nd December 1848.—xiv.—The Official Assignee shall be entitled to 5 per cent. commission on the principal sum forming the proceeds of each estate distributable as dividends. . . . .

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884. July 30.

12 Mad. 294.
15 Bom. 438.
25 Cal. 15?.
24 I.A. 172.
24 All. 467.
16 C.W.N. 971.
19 C.L.J. 167
44 Mad. 902

AYYASÁMI (PLAINTIFF), APPELLANT,

and

SAMIYA (DEFENDANT), RESPONDENT.*

Civil Procedure Code, s. 332—Limitation Act, sch. II, arts. 11, 13.

Where an application was made under section 332 of the Code of Civil Procedure for possession of property and rejected, and the applicant brought a suit to recover the property more than one year subsequent to the order rejecting the application:

Held, that the suit was not barred either by art. 11 or art. 13 of sch. II of the Indian Limitation Act, 1877.

THE plaintiff, Ayyasámi Ayyar, on the 6th March 1883 sued for possession of certain land, of which he had been dispossessed in November 1880 in execution of a decree obtained by the defendant, Samiya Pillai, in suit No. 1 of 1880 in the Subordinate Court of Kumbakonam.

In December 1880, plaintiff applied under section 332 of the Code of Civil Procedure to recover possession, but was referred by the Subordinate Court to a regular suit by an order dated 14th February 1882.

The District Múnsif of Mannargúdi (V. Mulhari Ráu) held that the suit was barred by art. 13 of sch. II of the Indian Limitation Act, 1877, and dismissed the suit.

On appeal, the Acting District Judge of South Tanjore (C. W. W. Martin) confirmed this decree. The plaintiff appealed to the High Court on the following grounds:—

(1) Plaintiff's claim is not barred by limitation.

(2) Setting aside the order of the 14th February 1882 is incidental and ancillary to the relief claimed by the plaintiff and is not the sole or final object of the suit.

(3) The articles of the Limitation Act relied on by the lower Courts have no application to the case.

* Second appeal 118 of 1884.

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Gópáláchárryar for appellant.

Rámáchandra Ráu Saheb for respondent.

The Court (Turner, C.J., and Hutchins, J.) delivered the following

JUDGMENT:—The provisions of article 11 in the second schedule to the Limitation Act do not apply in terms to a suit brought to test an order made under section 332 of the Civil Procedure Code, and we are not warranted in applying that article to any suits other than those to which express reference is made in the article. It is possible and was probable that mention of section 332 of the Code of Civil Procedure was omitted by oversight from this clause.

Nor, in our judgment, is this suit governed by the provisions of article 13, for that applies to decisions or orders passed in a proceeding other than a suit, whereas an order in an execution proceeding is an order in a suit. It may also be questioned whether this suit can be properly described as a suit to set aside an order, for it is a suit to establish the right of the plaintiff. The order under section 332 simply decided the question of possession, and is by the terms of that section made dependent on the result of the suit to establish the right. It is, therefore, unnecessary for the plaintiff to sue to have it cancelled.

We, therefore, set aside the decrees of the Courts below and remit this suit to the Court of First Instance for trial on the merits. The costs of the appeals will abide and follow the result.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884.
October 20.

PATHUMA (FIRST DEFENDANT), APPELLANT,

and

SALIMAMMA (PLAINTIFF), RESPONDENT.*

23 Cal. 416.
25 Do. 576.
2 C.W.N. 300.
29 Mad. 67.

Civil Procedure Code, s. 13—Decree of Competent Court—Res Judicata.

In 1875, P sued in a Múnsif's Court to eject a tenant from a house and to recover arrears of rent. S intervened and claimed the house under a deed of gift. The value of the property comprised in the deed of gift exceeded the limit of the

* Appeal 12 of 1884.

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PATHUMA v. SALIMAMMA.

pecuniary jurisdiction of the Múnsif's Court. The suit was dismissed. But on appeal the claim of S under the deed of gift was adjudicated upon and rejected, and P obtained a decree for the land.

In 1882, S sued P to recover all the property comprised in the deed of gift:

Held, that S was estopped by the decree in the former suit from claiming the house.

It was contended by P that the deed of gift was invalid:

Held, that, as to validity of the deed of gift, the decree of the Múnsif's Court was not the decree of a competent Court within the meaning of s. 13 of the Code of Civil Procedure, 1882, and, therefore, that S was not estopped from showing that the deed was valid, and claiming the rest of the property comprised therein.

THE plaintiff, Salimamma, sued her mother, Pathuma, and two others, to recover, *inter alia*, a shop and a warehouse (item 6 in schedule D of the plaint) under a deed of gift, executed by Pathuma and two other heirs of the deceased husband of Pathuma in 1863, to plaintiff and her deceased sister. The defendants pleaded (1) that this gift was intended for the benefit of Pathuma, and was made in the names of plaintiff and her sister on behalf of their mother, and (2) that the plaintiff's claim to this property was *res judicata*, by virtue of the decree in suit 422 of 1875, in the Court of the District Múnsif of Mangalore.

That suit was brought by Pathuma against a tenant to recover the shop and warehouse and arrears of rent. The tenant denied the title of Pathuma. Salimamma intervened and was made a defendant and claimed the property under the deed of gift of 1863.

The suit was decreed in favour of Pathuma upon appeal.

Upon this question the judgment of the Subordinate Judge (K. R. Krishna Menon) was as follows:—

"Whether the plaintiff's claim in respect of the properties described in schedule D is or not barred by section 13 of the Civil Procedure Code, is the fourth issue for determination. In 1875, the present first defendant instituted a suit before the District Múnsif of Mangalore to recover one warehouse and a shop (comprised in the gift) from a tenant to whom they had been verbally let by the present first defendant (the mother of the present plaintiff). The Múnsif disbelieved the letting and dismissed the suit. On appeal I believed the letting and, therefore, gave judgment for plaintiff reversing the original decree. For the purpose of determining the probabilities of the letting I incidentally considered the question of title also and decided it in favour of the present first defendant,

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and my decision was confirmed by the High Court on Second Appeal. This decision is now relied upon by the defendants as a bar to the present suit and a case decided by our High Court, *Mohidin* v. *Muhammad Ibrahím*(1) and two cases decided by the Calcutta High Court, *Toponidhee Dhirj Gir Gosain* v. *Sreeputty Sahanee*(2), and *Run Bahadoor Singh* v. *Lucho Kooer*(3), are cited as authorities in support of their contention. Whatever might have been the difficulty in finding out the true interpretation of the expression 'competent Court' used in former Code of 1877, that difficulty has been now removed by the unequivocal language used in section 13 of the present Code (Act XIV of 1882). The Court whose decision is pleaded as a bar should be one competent to try the subsequent suit, and it has been held to be so even under the old Code by the Judicial Committee of the Privy Council in *Misir Raghobardial* v. *Sheo Baksh Singh*(4). The first of the Calcutta cases cited by the defendants' Vakil is the identical one, the mischievous effects of which the Legislature removed by amending the language of the *res judicata* section of the Civil Procedure Code as the speeches of the Hon. Messrs. Evans and Stokes delivered at the passing of the present Code indicate. The decisions quoted are thus overruled not only by a subsequent decision of the highest authority but also by a Legislative enactment, and they are, therefore, of no weight. The present suit is beyond the pecuniary limit of the jurisdiction of the Court in which the former suit was entitled, and it has been decided by the first of the Calcutta cases cited by defendants that, in considering the competency of a Court for the purpose of deciding upon a question of *res judicata*, the powers of the Court in which the suit was instituted and not those of the Court in which the suit was decided on appeal must be looked to. The plaintiff's claim has not, therefore, become *res judicata*. Further, the causes of action in both the cases were different, and the determination of the question of title was not absolutely necessary in the former suit, and a finding upon the question of letting was sufficient to sustain the decision then arrived at, and upon this ground also the plea of *res judicata* cannot be sustained. I therefore find this issue against the defendants."

The plaintiff obtained a decree *inter alia* for the shop and ware-

(1) 1 M.H.C.R., 245.
(2) I.L.R., 5 Cal., 832.
(3) I.L.R., 6 Cal., 406.
(4) I.L.R., 9 Cal., 439.

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house and the rest of the property comprised in the deed of gift. Pathuma appealed.

Mr. *Shephard* and *Rámáchandra Ráu Sáhib* for appellant.

Mr. *Powell* for respondent.

The Court (Turner, C.J., and Muttusámí Ayyar, J.) delivered the following

JUDGMENT:—The first defendant brought a suit in the Múnsif's Court against a tenant of the shop and warehouse (item 6 in schedule D) claiming ejectment and three years' arrears of rent.

The plaintiff interfered and set up a title to the property under the gift on which she now relies. She was made a party to the suit. The value of the shop and warehouse was within the pecuniary limit of the Múnsif's jurisdiction.

An issue as to the title derived under the gift was framed and tried and decided by the Appellate Court in favour of the first defendant. The value of the whole property comprised in the gift was Rs. 2,577; the question as to validity of the gift involved the whole value of the property comprised in it; that question being whether the ostensible donees, the plaintiff and her sister, had received the gift for their own benefit or as name-lenders for their mother.

We hold that the decision of the Múnsif as to the title to the item of property then in dispute was the decision of a competent Court in a matter then directly in issue, and that it is binding on the plaintiff in this suit, but that it was not the decision of a competent Court as to the effect of the gift. In the result, we find the plaintiff is estopped from claiming the shop and godown and the mesne profits claimed in respect of that property.

We must also allow in part the objection that the properties 2 and 3, originally in schedule A, and now in schedule D, which, it is found, were purchased with the proceeds of the decree obtained by the first defendant in the suit brought by her against the tenant, cannot be recovered, the decree in the former suit operating to estop the present plaintiff from asserting her right to those proceeds.

It appears that these properties formed part of the estate of the father, but were conditionally sold. The repurchase, the plaintiff contends, was in effect a redemption. She is entitled to redeem $\frac{7}{10}$ths, but her share can only be recovered on payment of

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$\frac{7}{10}$ths of Rs. 800, which the plaintiff's counsel states she is willing to pay. The payment will be made in six months from the date of this decree; otherwise her right to redeem will be declared foreclosed.

As to the properties in D, the plaintiff is only entitled to one moiety. It is not proved she is entitled to more.

With these exceptions, we consider no sufficient ground has been shown for disturbing the decree of the subordinate Judge. It will be modified accordingly, and the parties will pay and receive proportionate costs in all Courts.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

26 Cal. 58

REFERENCE UNDER SECTION 46 OF THE STAMP ACT.*

1884. November 25.

35 C. L. J. 459

Stamp Act, sch. 1, *art.* 11.—*Promissory note—Bond—Impressed label—Impressed sheet—Rule* 9(*a*) *of the Rules of Government of India of* 26*th February* 1881.

By a document, dated 8th March 1882, which purported to be a promissory note attested by three witnesses and written on an impressed label of two annas, A promised to pay B before a certain date Rs. 135:

Held, that the document was a bond and must be treated as unstamped for the purposes of section 34 of the Indian Stamp Act, 1879.

By a document, dated 23rd June 1880, stamped with an adhesive stamp of one anna, purporting to be a promissory note attested by two witnesses, A promised to pay Rs. 56 to B or order, on demand:

Held, that the document was not a bond but a promissory note.

THIS was a reference to the High Court by the Board of Revenue under section 46 of the Indian Stamp Act, 1879.

The Resolution of the Board of Revenue, dated 8th July 1884, was as follows:—

"A promissory note for Rs. 135 was written on hundi paper with an impressed label of two annas affixed under Rule 9(*a*) of the rules, dated 26th February 1881. As it was attested, the District Múnsif of Bárkúr treated it as a bond, which ought to

* Referred case 5 of 1884.

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REFERENCE UNDER STAMP ACT, S. 46.

be written on an impressed sheet with a stamp of value one rupee, and levied fourteen annas as the deficiency, with ten rupees as a penalty.

"The Head Assistant Collector moved the District Court under section 50 of Act I of 1879, representing that the Múnsif ought to have treated the document as unstamped and to have collected one rupee besides the penalty. The District Judge remarked that the document as a promissory note would have been correctly stamped, and that the Múnsif was right in collecting only fourteen annas deficiency and ought to have levied ten times that amount, and not ten rupees, as the penalty.

"The same point arose with regard to a witnessed promissory note for Rs. 56, which bore an adhesive stamp of one anna. The District Múnsif of Mulki treated it as a bond and levied seven annas as deficiency with a penalty of five rupees. The Collector moved the District Judge, who adhered to the view he had taken in the previous case.

"As these documents by being attested came within the definition of bonds, the rules required them to be written on impressed sheets, and the adhesive stamp and affixed label cannot, in the opinion of the Board, be taken into consideration. The documents were legally unstamped, and the Board consider that the Courts were mistaken in dealing with them as merely insufficiently stamped.

"As regards the first case, the Collector submits that a promissory note, which under article 11 of the schedule requires a stamp of more than one anna, cannot be written on hundi paper with an affixed impressed label, and that the District Judge was in error in holding that the document, if a promissory note, was correctly stamped.

"The Board observe that the word 'hundi' is not defined in the Stamp Act or in the Negotiable Instruments Act, although it is used in the rules under the Stamp Act issued by the Government of India. It is usually understood to mean a bill of exchange, but as the District Judge of South Canara holds that it includes a promissory note, and as the Collector refers to this point in his annual report upon the stamp revenue, the Board resolve to refer this question also to the High Court."

The promissory note for Rs. 135 referred to in the Resolution

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of the Board of Revenue was dated 8th March 1882, and the date of the promissory note for Rs. 56 was 23rd June 1880.

REFERENCE UNDER STAMP ACT, S. 46.

The Government Pleader (Mr. *Shephard*) appeared on behalf of the Board of Revenue.

The judgment of the Full Bench (Turner, C.J., Kernan, Muttusámi Ayyar, Hutchins and Brandt, JJ.) was delivered by

TURNER, C.J.—We reply to this reference that the document of the 8th March 1882 being attested and not payable to bearer or order, is a bond as defined in the Stamp Act, that the stamp it bore was not a stamp which was proper for such an instrument, and that the instrument should have been treated as unstamped.

The instrument of 23rd June 1880 is a promissory note payable to order and therefore, although attested, it is not a bond and it bears a proper stamp as a promissory note.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

MÍNÁKSHI (DEFENDANT NO. 1), APPELLANT,

and

VÍRAPPA AND ANOTHER (PLAINTIFF AND DEFENDANT NO. 11), RESPONDENTS.*

1884. March 13. October 15.

16 mad. 76. 37 all 162

Hindú law—Unborn son—Right to ancestral property not defeated by will of father.

According to the Hindú law which obtains in the Madras Presidency the right of a son in the womb to ancestral property cannot be defeated by a will or gift.

Quære: Whether this rule would govern the case of an alienation for value.

THIS was an appeal from the decree of E. Turner, Acting District Judge of Madura, dated 28th September 1883, modifying the decree of T. Ganapathi Ayyar, Subordinate Judge of Madura (East), in suit 53 of 1882.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J).

The Advocate-General (Hon. *P. O'Sullivan*) and *Gopáláchárya*r for appellant.

Bháshyam Ayyangár for respondents.

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* Second Appeal 1063 of 1883.

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MÍNÁKSHI v. VÍRAPPA.

JUDGMENT:—In this case one Anaiyappa Pillai died on the 4th of February 1874, leaving two widows, Mínákshi, defendant No. 1, and Avadai, defendant No. 11. Avadai was delivered of a son Malaiayya on the day following his father's death. This son died in 1878 and Avadai claimed to succeed to ancestral property left by Anaiyappa Pillai as the mother and heiress of her son. In that character she has granted a lease to the plaintiff Vírappa Náyakan. Her right to make this lease is contested by Mínákshi, who relies upon an alleged will executed by Anaiyappa Pillai on the day preceding his death and registered on the day of his death.

It has been found that Anaiyappa Pillai, at the time of the execution of the will, understood its purport and effect, and that he did not execute it under undue influence, but freely and voluntarily. The question arises whether the will can take effect so as to defeat the right of this unborn son.

On the question as to the time at which the right of a son accrues to share in ancestral property a wide difference of opinion prevailed among Hindú lawyers. The author of the Dáyabhága held that the right accrued only on partition, and the author of the Mitákshará that it accrued on birth. By the latter, for certain purposes conception was regarded as equivalent to birth; for instance, if a partition was made among brothers, and it was known that their mother was pregnant, a share was to be reserved, and if after a partition the mother bore a son who must have been conceived before partition, the partition was to be re-opened and the rights of the child in the womb recognized. A passage has been cited by Mr. *Bháshyam Ayyangár* from the Smriti Chandrika, ch. I, paragraph 27, in which the author, reciting the sloka "The venerable teachers direct that ownership to wealth is acquired by birth alone," explains the term "by birth alone" as meaning "by the very formation of the fœtus in the mother's womb."

The testamentary power of a Hindú has been held not to be more extensive than his power of gift, and it has been held by this Court in *Muthia Chetti* v. *Zamindár of Ramnád*(1) that a father cannot make a gift of ancestral property so as to defeat the rights of a son begotten, but as yet unborn.

When a question arises as to the effect of a gift or testamentary

(1) 2 Ind. Jur., 205.

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disposition to defeat the rights of an unborn son, we conceive we are following what was understood to be the Hindú law of this Presidency in supporting the ruling cited.

It was observed by Mr. Justice Willes in the *Tagore Case*(1), when commenting on limitations of property to certain persons, that "by a rule now generally adopted in jurisprudence, this class would include children in embryo who afterwards came into separate existence," and if the note which has been given us of a decision of this Court in Regular Appeals 43 and 46 of 1874(2) is correct, Mr. Justice Holloway declared that the rule of Hindú law was on this point analogous to the rule referred to by Mr. Justice Willes.

We hold, then, that the rights of a son in the womb to ancestral property cannot be defeated by a will or a gift.

Whether there may not be grounds for holding otherwise in the case of an alienation for value is a question which we need not now consider.

There are obvious reasons of convenience for holding that a purchaser for value is not bound to enquire whether the wife of the seller is *enceinte*, nor indeed has science yet arrived at such a point that where there has been frequent opportunity of access between the parents a conclusive opinion can be formed as to the exact moment of conception.

Whether an alienation to a *boná fide* purchaser for value, which would be valid if made with the consent of sons, and valid if there were no sons in existence to consent to it, would be voidable because of the existence of a child in the womb, which might or might not be a son, we should prefer to determine after hearing the full arguments.

In the present case, we must hold that the estate of Anaiyappa Pillai vested in his son on his birth, and, on the son's death, in Avadai.

We do not overlook the right of Mínákshi to maintenance, but that is not a question which can be determined in this suit.

The appeal consequently fails and is dismissed with costs. The memorandum of objections not being pressed, is dismissed.

(1) 9 B.L.R., 397.
(2) Not reported; see Revenue Register vol. ix, p. 38, and 2 Ind. Jur., 208.

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18 CWN 131
20 CLJ 285

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884.
October 23.

SUBRAMANYA (FIRST DEFENDANT), APPELLANT,

and

PONNUSÁMI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindú Law—Sale by widow in excess of power—Suit by reversioners for share of land sold on payment of proportionate amount of sum properly lent—Decree for redemption.

The widow of a Hindú sold to the defendants a portion of her husband's estate for less than its market value and for a sum in excess of what she was justified in raising by sale. The plaintiffs, two of three reversioners entitled to the estate, sued, on the death of the widow, to recover from the purchasers two-thirds of the land sold upon payment of two-thirds of the sum which the widow was justified in raising:

Held, that the plaintiffs were entitled to the relief claimed.

THIS was a suit by two Hindú reversioners to recover a two-thirds share in thirty parcels of land, which had been sold by the widow of their cousin, with mesne profits from the date of the widow's death in 1881.

The defendants, Nos. 1 and 2, were the purchasers. Defendant No. 3 was a reversioner alleged to be entitled to one-third share.

The pleas were (1) that the first plaintiff, Ponnusámi Udayan, having embraced Christianity, had no right to the land; (2) that the sales had been made for legal necessity.

The District Múnsif of Tiruvalúr (T. Kanakasabai Mudali) held that the sales had been made for proper purposes and dismissed the suit.

On appeal the District Judge of North Tanjore (W. F. Grahame) held that by virtue of Act XXI of 1850, plaintiff No. 1 had not lost his rights and found that the widow, to discharge a debt of Rs. 349-1-3, sold without pressure, for Rs. 500, property worth Rs. 1,500.

The District Judge decreed (citing Mayne's Hindú Law, sections 545, 560) that plaintiffs should recover two-thirds of the

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* Second Appeal 1096 of 1883.

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land sued for and mesne profits from the date of decree on condition of paying two-thirds of Rs. 349-1-3 with interest at 6 per cent. per annum since death of the widow.

SUBRAMANYA v. PONNUSÁMI.

Defendant No. 1, Subramanya Udayan, appealed to the High Court, *inter alia*, on the following grounds:—

(1) The District Judge was wrong in treating the sale by the widow as a mortgage.

(2) Plaintiff No. 1 having become a Christian before Act XXI of 1850 came into operation and before any right in the land vested in him, had no right to a share.

(3) The District Judge was wrong in charging interest on the amount advanced by defendants only from the date of the widow's death.

(4) Plaintiffs were not entitled to any mesne profits.

Hon. *Rámá Ráu* for appellant.

Mr. *Shaw* (with him Mr. *Norton*) for respondents.

The Court (Turner, C.J., and Hutchins, J.) delivered the following

JUDGMENT:—The Appellate Court has disposed of this appeal according to the ordinary rule in such cases. Where it is found that an alienation has been made by a widow to a person cognizant of the circumstance to an extent considerably in excess of what the justifying purpose requires, the Court, at the instance of the reversioner, may declare the alienation valid only as a mortgage for the amount which should properly have been raised.

The Appellate Court has therefore rightly held plaintiffs entitled to redeem.

But, in ascertaining the amount which it is incumbent on them to pay, the Judge should, in our judgment, have allowed, in addition to the amount awarded by him, the sum of Rs. 22-3-0 which was paid to the conditional mortgagee and interest to the extent of Rs. 52-13-1 on the debts which were discharged by the alienee.

Although the instruments by which those debts were secured provided only for the payment of interest at the rate of 12 per cent. up to certain dates, specified in them respectively, when payments were not made at the appointed times, interest would be fairly chargeable at the rate agreed until satisfaction of the claim.

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SUBRAMANYA v. PONNUSÁMI.

The decree of the Appellate Court is varied by declaring that the plaintiffs are entitled to recover possession on payment of two-thirds of Rs. 75-5-9 in addition to the amount mentioned in that decree.

The parties will respectively pay and receive proportionate costs in this appeal.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. November 11.

VIJAYA (PLAINTIFF), APPELLANT,

and

SRIPATHI (DEFENDANT), RESPONDENT.*

24 Bom 390. 26 Bo. 709.

Hindú Law—Maintenance—Suit to reduce rate awarded by decree.

S, a Hindú, obtained a decree for maintenance at a certain rate against R, her father-in-law. After the death of R, V, who was adopted by R, subsequent to the decree, sued S to have the rate reduced on the ground that the estate of R, which came to his hands, was considerably diminished in value:

Held, that, as the estate had been diminished by the voluntary acts of R and V, the claim could not be allowed.

THIS was an appeal from the decree of M. Cross, Subordinate Judge at Kumbakónam.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.).

Gópáláchháryar for appellant referred to *Ruka Bái* v. *Ganda Bái* (1); 1 West and Bühler p. 262; Mayne's Hindu Law, sec. 383; *Sreeram Buttacharjee* v. *Puddomookhee Debia* (2); *Ram Kullee Koer* v. *The Court of Wards* (3).

Hon. *Rámá Ráu* for respondent.

JUDGMENT:—The defendant Sripathi Ammál obtained a decree against her father-in-law, Ramudu Chetti, declaring her entitled to receive annually for her maintenance 50 kalams of paddy now estimated at Rupees 50, Rupees 480 in cash and Rupees 60 in lieu of a residence.

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* Appeal 60 of 1884. (1) I.L.R., 1 All., 594. (2) 9 W.R., 152. (3) 18 W.R., 474.

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The plaintiff, Samudra Vijaya Chetti, the brother-in-law of Ramudu Chetti, who was adopted by him subsequently to the decree, has come into Court claiming that the maintenance should be reduced, inasmuch as the estate which came to his hands and is now enjoyed by him is considerably less in value and extent than the estate in the hands of Ramudu Chetti at the time the decree was passed in the defendant's favour.

The circumstances which the plaintiff alleges as having reduced the extent and value of the estate are the assignment of 22½ vélis to the widow and 3 vélis to the grand-daughter of the deceased Ramudu Chetti in pursuance of his will, the sale by the plaintiff of about 36 vélis in part to satisfy heavy debts incurred by him in establishing his right of succession and in part to discharge sums which he was directed to pay by the will of Ramudu Chetti.

The plaintiff alleges that the lands remaining in his hands are only 46 vélis for his own use, and 6 vélis dedicated to a charity, and he asserts that the 46 vélis yield a net income of only a little over Rupees 1,000.

He also asserts that he has still to pay debts amounting to Rupees 18,000.

It is contended on behalf of the defendant that a suit will not lie to alter the rate of maintenance which has already been determined by judicial decree; next, that the plaintiff has not truly stated the amount which he received from his adoptive father; thirdly, that the amount so received and the income which he has enjoyed was amply sufficient to discharge all proper expenditure; fourthly, that if, notwithstanding the decree obtained by the defendant, the question as to the propriety of the rate of maintenance can be re-opened, it can only be re-opened when the change of circumstances has been brought about independently of the voluntary action of the person chargeable with the maintenance, and of those claiming under him; and, fifthly, that if there had not been deducted from the estate as it stood in the time of Ramudu Chetti what has passed out of the hands of the plaintiff by the voluntary act of his adoptive father, or by his own act, the estate would have produced an income, in proportion to which the maintenance decreed to the defendant would still be reasonable.

It is unnecessary for us to determine in this suit whether a decree for maintenance once passed can or cannot be varied by

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VIJAYA v. SRIPATHI.

subsequent proceedings. Possibly this Court would hold, as has been held elsewhere, that a reduction of the family wealth would, under certain circumstances, justify a reduction in the allowance assigned for maintenance even as the result of judicial decision.

But we are not aware of any case in which it has been held that where the family property has been diminished by the voluntary act of those who are liable for the maintenance of the family, such reduction justifies a diminution of the rate agreed or allowed by Court.

To hold otherwise would be to put it in the power of any person liable to such a charge to defeat the charge, and where there has been a decree to defeat the decree.

To apply these principles to the present case, the Judge doubts, and it appears to us not without reason, whether the plaintiff has correctly stated the amount of property which he received on the death of Ramudu Chetti. His adoptive father had not only possessed an estate in land yielding an income of upwards of 15,000 rupees annually, according to plaintiff's own estimate, but he had engaged in money dealings, and it is improbable that he left no more than the outstandings admitted by the plaintiff. Assuming, however, that the sum due to him at his decease was no more than the 30,000 rupees admitted by the plaintiff, and of which he has collected 17,000 rupees; this sum with the annual income of the estate ought to have sufficed to meet all the necessary charges of litigation. Of these charges the plaintiff produces no account. They could hardly have exceeded 15,000 rupees unless the remuneration for professional assistance was much larger than the law required, or is customary in practice. The other causes which have produced a diminution of the family estate, are either the will of Ramudu Chetti or the voluntary acts of the plaintiff.

In the view which we take of the law, although no doubt Ramudu Chetti would have been justified in providing maintenance for his widow and also in making provision for the marriage of his grand-daughters, the plaintiff would not have been bound to give effect to those directions in such a manner as to disable him from meeting the reasonable sum for maintenance which had been awarded by the decree to the defendant; still less was the plaintiff justified in surrendering to another daughter-in-law a capital sum

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which would produce an income largely in excess of that enjoyed by the defendant, or in making payment of a considerable sum to construct a mantapam, even though Ramudu Chetti may have expressed his intention of so doing. Neither the alienations by Ramudu Chetti nor the alienation by the plaintiff can, under the circumstances, be set up to defeat the decree obtained by the defendant.

SUBRAMANYA v. PONNUSÁMI.

We consider then that the Judge was fully justified in dismissing the present suit. To hold otherwise would be to sanction the doctrine that the rights of third parties can be subordinated to the arbitrary pleasure of persons whose obligation to respect them has been established by judicial decision.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

ROBERT BELL NIXON (INSOLVENT), APPELLANT,

and

THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA (OPPOSING CREDITOR), RESPONDENT.*

1884. October 14.

13 Mad. 150.

Insolvent Act, 11 & 12 Vict., c. 21, ss. 47, 51.

By an order made under the provisions of 11 & 12 Vict., c. 21, it was directed that an insolvent-debtor was entitled to his discharge as to all the debts mentioned in his schedule, save and except the debt due to a certain creditor, and as to such debt that the insolvent should be entitled to be discharged as soon as he had been in custody at the suit of the creditor for six months, and it was further ordered that the insolvent be committed to custody in respect of this debt for six months :

Held, that the order of committal was within the power given to the Court by sections 47 and 51 of 11 & 12 Vict., c. 21.

THIS was an appeal from an order of Kernan, J., dated 25th August 1884, made in the Insolvent Court in the matter of the petition of Robert Bell Nixon, an insolvent-debtor.

The material portion of the judgment of Kernan, J., for the purpose of this report, was as follows :—

* Appeal 16 of 1884.

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NIXON v. CHARTERED MERCANTILE BANK.

"I think the debts of the insolvent so far exceeded his means of paying as to show gross misconduct in contracting his debts. He was utterly insolvent, and was so for at least twelve months before the year 1883.

"As regards the debt of the Chartered Mercantile Bank to the extent of Rs. 80,000, I order that the insolvent Robert Bell Nixon be discharged, when he shall be in custody at the suit of the Bank for six months, and I order the insolvent to be committed to custody in respect of the debt, to the extent of Rs. 80,000, during the said period of six months, and that the Official Assignee do pay to the insolvent, while in custody, Rs. 5 per week.

"As regards the general creditors, who have not made any special case, I will merely discharge the insolvent under section 47. He has been before this Court, now, since 5th July 1883, and his future property will be liable to his debts, unless he may hereafter obtain an order under section 66."

Upon the application of the insolvent, it was ordered that his solicitors should be paid Rs. 250 in addition to the costs of schedule, to enable the insolvent to appeal, if so advised, and that the order for arrest should not issue for one month.

The insolvent appealed on the ground, *inter alia*, "that the learned Commissioner having passed a final order discharging the insolvent as to all his debts, except the debt due to the Chartered Mercantile Bank of India, London, and China, and as to that debt discharging the insolvent, as soon as he should have been in custody at the suit of the said Bank for a period of six months, had no power to order the commitment of the insolvent to custody."

Mr. *Shaw* for appellant.

Mr. *Branson* for the Bank.

The judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.), after discussing the evidence, proceeded as follows:—

When we look to the general conduct of the insolvent as a merchant, there is unfortunately nothing that would justify us in interfering with the Commissioner's order. The insolvent knew that his capital had been lost: he must have known at the latest in February and March 1883 that his liabilities had increased so largely that he had been for some time speculating with the money of his creditors: he nevertheless continued business which his experience had shown him involved considerable risk, and

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allowed the monies he received from Madras merchants and the Bank to go to his general account and satisfy prior engagements. He was thus unable to obtain the goods, which, in the case of the merchants, he had received their monies to buy, and, in the case of the Bank, he had represented himself as having acquired and could hold as security.

NIXON v. CHARTERED MERCANTILE BANK.

The order of the learned Commissioner appears to us to be within his powers under sections 47 and 51 of the Act. The 47th section gives the Commissioner power to commit an insolvent to custody for any debt or demand if he is not already in custody, and the 51st section gives him power in the cases mentioned in that section to adjudge that the insolvent shall be discharged when he shall have been in custody for a time specified not exceeding two years. Instead of committing the insolvent, the learned Judge might have refused protection and left the opposing creditor to a suit to secure the imprisonment of his judgment-debtor, but this would have occasioned useless expense.

We dismiss the appeal and allow the costs of the opposing creditor in this Court out of the estate. The order of the learned Commissioner will issue forthwith.

Solicitors for Nixon : *Grant & Laing.*

Solicitors for the Bank : *Branson & Branson.*

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

SIVARÁMA (AUCTION-PURCHASER), PETITIONER,

and

RÁMÁ AND OTHERS (JUDGMENT-DEBTORS), RESPONDENTS.*

1884. November 20.

9 mad. 437. 18 Bom. 5?? 27 Cal. 183 36 C.L.J. 121 50 Cal. 1?? 50. mad 639

Civil Procedure Code, ss. 313, 315—*Refund of purchase-money—Limitation Act, sch. II, art.* 174.

Under s. 313 of the Code of Civil Procedure a purchaser at a sale in execution of a decree may resist the confirmation of the sale and prevent its conclusion, while under s. 315 he may apply, after the confirmation of the sale, for refund of the purchase-money on the ground that nothing passed by the sale.

* Civil Revision Petition 255 of 1884.

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SIVARÁMÁ v. RÁMÁ.

To entitle a purchaser, under para. 2 of s. 315 of the Code of Civil Procedure, to a refund of purchase-money, it is not necessary that a Court should have decided in other proceedings that the judgment-debtor had no saleable interest in the property which purported to be sold, or that the purchaser should have obtained actual possession and have been deprived thereof.

THIS was an application to the High Court under s. 622 of the Code of Civil Procedure to set aside an order of C. Gopálan Náyar, District Múnsif of Shernád, rejecting an application, made on the 2nd April 1884, under s. 315 of the Code of Civil Procedure, by Sivarámá Krishna Bhatta, plaintiff in suit 170 of 1882, and purchaser of certain land sold in execution of the decree in the said suit on the 28th November 1882, for a refund of purchase-money paid by him for the said land, on the ground that the judgment-debtors had no saleable property therein, (their interest having been already sold in execution of another decree) by cancelling a receipt acknowledging satisfaction of the decree to the extent of the purchase-money. The petitioner also prayed for an order that he should be at liberty to recover the said sum under the decree.

The District Múnsif delivered the following

JUDGMENT.—"If debtors had no saleable interest, petitioner should have asked under s. 313 to set aside the sale, and he is now barred from doing so under art. 172 of sch. II of the Limitation Act. In my opinion s. 315 is inapplicable to the case, inasmuch as the sale has not been set aside under s. 312 or s. 313, nor has it been found (by a judicial tribunal) that petitioner has been deprived of the property by reason of want of interest in the debtors nor has money been paid to any person as provided therein. I reject the petition."

Gopálan Náyar for petitioner.

Respondents were not represented.

The judgment of the Court (Turner, C.J., and Hutchins, J.) was delivered by

TURNER, C.J.—It would be idle to refer the purchaser to a suit (in which he must be defeated) to entitle him to claim a refund under s. 315, para. 2, and there is no reason why the term "it is found" should not apply to the Court executing the decree as well as to any Court in which the right to insist on the purchase is decided in a separate suit. It is more difficult to determine why a purchaser who is allowed only sixty

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days for an application under s. 313 should, if that period has elapsed without an application, be permitted to make another application under s. 315, but it is clear that if we construe the terms "is deprived of it" as meaning a deprivation of possession, we are putting on those terms a meaning which they do not necessarily bear, and we are excluding from the operation of the section many cases which, it may reasonably be inferred, it was intended to include; for instance, where a purchaser after obtaining a certificate applies for possession and is resisted and is referred to a suit in which he fails. This is the case of most common occurrence. We might also exclude cases which are frequent where the interest is one which does not admit of certain possession. On the whole, the distinction we think between the two applications under the two sections is this. Under s. 313 the purchaser may resist the confirmation and so prevent the conclusion of the sale, while under s. 315 he may apply after the confirmation of the sale for the refund of the purchase money, on the ground that nothing has passed by the sale.

SIVARÁMÁ v. RÁMÁ.

We set aside the order of the Múnsif and direct him to pass a fresh order. We make no order as to costs.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884. September 22. November 20.

13 All. 383.

KUNHI MOIDIN (AUCTION-PURCHASER), PETITIONER,

and

TARAYIL MOIDIN (DECREE-HOLDER), RESPONDENT.*

Civil Procedure Code, s. 315—Refund of purchase money.

Upon an application for refund of purchase money under section 315 of the Code of Civil Procedure, the Múnsif, being of opinion that the purchaser had in collusion with the judgment-debtor run up the price of the land at auction far beyond its value with a view to prevent other property attached from being sold to satisfy the decree, rejected the application, except as to a sum of Rs. 50, which represented the alleged value of the judgment-debtor's interest in the land brought to sale by the decree-holder:

Held, that, as the judgment-debtor was found to have no interest in the land, the purchaser was entitled to a refund of the money paid to the decree-holder.

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* Civil Revision Petition 64 of 1884.

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KUNHI MOIDIN v. TARAYIL MOIDIN.

This was an application under section 622 of the Code of Civil Procedure to set aside an order of P. Govinda Menon, District Múnsif of Ernád, dated 20th December 1883, made on a petition under section 315 of the Code of Civil Procedure.

The petitioner, Pukkoden Kunhi Moidin, applied for a refund of Rs. 475 paid by him on 12th June 1878, as purchaser of certain land at an auction sale in execution of the decree in suit 226 of 1876.

Possession was not obtained, the land being in the possession of a stranger, and, in suit 450 of 1882, brought by the petitioner against the decree-holder and others to establish his claim to the land, it was decreed that the judgment-debtor in suit 226 of 1876 had no interest in the land.

The decree-holder in suit 226 of 1876, Tarayil Moidin, opposed the petition for refund on the ground that the petitioner had conspired with the judgment-debtor to defraud him. He alleged that he had only brought to sale his judgment-debtor's panayam (mortgage) right in the land worth Rs. 50, and that the purchaser who was a relative of the judgment-debtor had bid at auction for the land till the price exceeded the amount of the decree and far exceeded the value of the interest, which, he asserted, was possessed by the judgment-debtor in the land, with a view to prevent other property attached from being sold.

The judgment of the Múnsif was as follows:—

"On looking into the nature of the case and the state of the paramba, I have no doubt whatever that the auction-purchaser and judgment-debtor have colluded and that this mere uyupa-ramba has been purchased for more than its real value and that the other properties have been caused to be released from attachment. No man of sense would purchase this paramba for Rs. 475. The very fact of purchasing at that price by the auction-purchaser is itself the strongest evidence of fraud. It is difficult to obtain clear evidence of fraud. It is only possible to guess from fact. A Court of Justice will not execute a claim based on fraud. There shall, therefore, be no order under section 315 to return the full amount to the auction-purchaser. I have no doubt that the decree-holder in this case mentioned, without information, in the schedule that the debtor has a panayam claim of Rs. 50 on the paramba in dispute. I think that, as the decree-holder did not make sufficient inquiry when that claim was mentioned, he is to

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return to the auction-purchaser the amount of the claim alleged to have belonged to the debtor. On these grounds, it is ordered that the decree-holder shall return Rs. 50 to the auction-purchaser and both parties shall bear the costs."

KUNH MOIDIN v. TARAYIL MOIDIN.

Gopálan Náyar for petitioner.

Sankaran Náyar for respondent.

The judgment of the Court (Turner, C.J., and Hutchins, J.) was delivered by

TURNER, C.J.—In this case a person who purchased property at auction in execution of a decree applied for possession; this claim was resisted. He brought a suit to vindicate his title, and it was held on the 14th October 1882 that the judgment-debtor had no saleable interest in the property. He then applied for a refund of his purchase money. The Múnsif had reason to think that the purchaser had, in order to defeat the right of the decree-holder, run up the price, and eventually had been declared to be the purchaser on a bid greatly in excess of the value; and on this ground he refused a refund of more than what he supposed to be the actual value.

If it had been found that the judgment-debtor had any saleable interest, the sale would have been sustained notwithstanding the price might have been excessive.

The decree-holder was himself to blame for causing an alleged right to be brought to sale when his judgment-debtor possessed none.

It was obviously the intention of the Legislature that, when there is no saleable interest, the sale shall be held null and void, as it would be if it had been made otherwise than in execution of a decree of Court. The purchaser having been deprived of the supposed interest offered for sale, is entitled to a refund of all that he paid, though the decree-holder can only be responsible for what he has actually received.

The Múnsif may properly refuse interest if it is proved the purchaser has largely contributed to the loss he has sustained in this respect.

The order of the Múnsif is set aside and he is directed to pass a fresh order. Each party will bear his own costs of this application.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

1884. November 25, 26.

REFERENCE UNDER SECTION 46 OF THE INDIAN STAMP ACT.*

Stamp Act, sch. I, art. 44 (b)—S. 3(13), sch. I, art. 29; art. 5(c)—Mortgage—Assignment of growing coffee.

By an agreement made the first day of September 1884, A, in consideration of Rs. 1,000 to be advanced to him by B, assigned to B the whole crop of coffee then growing upon a certain estate, upon trust, *inter alia*, to secure the repayment of the sum advanced.

It was stipulated that A should cultivate the crop till maturity and deliver it to B:

Held, that this document was a mortgage liable to duty under art. 44 (b) of sch. I of the Indian Stamp Act, 1879.

THIS was a case referred to the High Court, under s. 46 of the Indian Stamp Act, 1879, by the Board of Revenue.

The case was stated by the Secretary to the Board of Revenue as follows:—

"I am directed to forward, under s. 46 of the Stamp Act, for the decision of the High Court, the enclosed document, by which a coffee-planter binds himself to deliver his crop in return for advances of money from the Bank.

"A similar document was forwarded in referred case No. 1 of 1871, and the Court, on 15th January 1872, decided that it was a mortgage under s. 3, cl. 18, of Act XVIII of 1869. Since then Act I of 1879 has come into force and art. 29 of sch. I is new; but the Board have ruled that, following the definitions in the General Clauses Act, a coffee crop on the bushes is immovable property, and that, therefore, such documents do not fall under art. 29, but must be treated as mortgages under art. 44 of sch. I, Act I of 1879.

* Referred case 8 of 1884.

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"Messrs. *Barclay & Morgan* in forwarding this document for adjudication, urge the following points :—

REFERENCE UNDER STAMP ACT, S. 46.

"(*a*) The document is not a mortgage within the definition given in s. 3 (13). It transfers or creates in favor of the Bank no right over specified property. The coffee growing on the estate has not arrived, and possibly may never arrive, at that stage when it can be called a crop—(See the decision of Sir Richard Garth at II, Calcutta series, 87—'The question of stamp must depend on the state of things existing at the time when the mortgage was made'). The document does not contemplate the existence of the crop. On the contrary, the advances of money are made for the purpose of calling the crop into existence. The document, therefore, does not come within the definition of a mortgage, and is an agreement not otherwise provided for, chargeable with duty under art. 5(*c*) of the schedule.

"(*b*) If this decision of the Calcutta High Court is not followed, the document may be held to fall under art. 29 of the schedule. Act III of 1877 defines movable property so as to include fruit upon trees, and the Allahabad High Court followed this definition in construing Act XI of 1865—(see III, Allahabad series, 168).

"(*c*) If it is held that the document does not fall under art. 29, it must fall under art. 44 (*b*) and not under art. 44 (*a*) —(see the decision reported at VIII, Bombay series, 310).

"The Board, as at present constituted, are of opinion that, because the crop is to be delivered only after it is picked, the property to be delivered is movable property, the General Clauses Act notwithstanding, and further that the property pledged being non-existent and only potential at the time of the execution of the deed, is, therefore, not sufficiently specific to bring the document within the definition of a mortgage deed and that it is assessable to stamp duty either under arts. 29(*a*) or 5(*c*)."

The material portions of the said document, dated 18th September 1884, and called an agreement made between Henry

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REFERENCE UNDER STAMP ACT, S. 46.

Wilkinson, a coffee-planter, and the Agra Bank are set out in the judgment of the Full Bench.

The Government Pleader (Mr. *Shephard*) for the Board of Revenue.

Mr. *Tarrant* for the Agra Bank.

The Government Pleader.—The document is a mortgage within the meaning of art. 44 (*b*) of sch. I of the Stamp Act. Arts. 14, 15, 55 are not applicable. The only question which can arise is whether it falls within art. 29.

[Hutchins, J.—That would apply to the covenant as to future crops.]

Growing crops can be mortgaged—*Petch* v. *Tutin.*(1) A mortgage is defined (if it can be called a definition) in s. 3 (13) of the Act. The chief difficulty is as to whether there is existing property.

In *Moran* v. *Mitta Bibee* (2) there was an agreement for a mortgage. No crop was assigned, but indigo was to be manufactured. Art. 44 speaks of mortgages generally: the nature of the property is immaterial.

Mr. *Tarrant.*—There can be no crop till it is mature. It is estimated to weigh two tons. Money is advanced to raise it, the planter has to cultivate it till maturity and then deliver to the Bank. The General Stamp Act of 1879, under which the decision of Sir W. Morgan, C.J., and Innes, J., in referred case 1 of 1871 was passed, differs from the present. By cl. 18 of s. 3 of that Act every pledge of property is included in a mortgage. Nor is it specified property within the meaning of s. 3 (13) of the present Act.

[Kernan, J.—The Bank obtains an actual interest which will prevent creditors attaching it].

As to art. 29, the crop is movable property—*Nusir Khan* v. *Karamat Khan.*(3) Fruit on trees is movable property according to the General Clauses Act and Registration Act.

The Government Pleader in reply.—All that the instrument under art. 29 has to do is to evidence an agreement to secure.

The judgment of the Full Bench (Turner, C.J., Kernan, Muttusámi Ayyar, Hutchins, and Brandt, JJ.) was delivered by

(1) 15 M. & W., 110. (2) I.L.R., 2. Cal., 56.
(3) I.L.R., 3 All., 168.

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REFERENCE UNDER STAMP ACT, S. 46.

TURNER, C.J.—The owner of a coffee estate, in consideration of advances made or to be made up to Rs. 1,000 by the Agra Bank, assigned to the Bank the whole of the crop of coffee then growing on the estate, upon trust to sell the same and apply the proceeds to the satisfaction of the sums advanced and interest.

It was agreed that the crop should be allowed to remain in possession of the planter, who was to cultivate, gather and prepare the crop, and deliver it to the Bank. It was further stipulated that, if the proceeds of the growing crop were insufficient to meet the advances, the planter should repay the difference within one year, and should, if required to do so, execute a charge on the crop to be produced in the year 1884-85.

Assuming that this instrument created an interest only in movable property, as to which we pronounce no opinion, it created not a mere hypothecation or pledge of the property but an assignment of the property by way of mortgage, and, consequently, was liable to stamp duty under art. 44 (*b*) of sch. I of the Indian Stamp Act, 1879.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, and Mr. Justice Hutchins.

1884.
October 7.

MARI (PLAINTIFF), APPELLANT,

and

CHINNAMMÁL AND OTHERS (DEFENDANTS), RESPONDENTS.*

16 Cal. 367.
13 Mad. 10.
16 B.C. 394.
19 Bom. 70.
21 Mad. 2
37 Mad. 2
45 Mad 257
52 Bom 393

Hindú law—Inheritance—Stepmother—Paternal uncle.

Under the Hindú law which obtains in the Presidency of Madras, a stepmother does not succeed to the estate of her stepson in preference to a paternal uncle.

Kumaravélu v. *Virana Goundan* (I.L.R., 5 Mad., 29) and *Muttammál* v. *Vengalakshmi Ammál* (I.L.R., 5 Mad., 32) approved.

THIS was an appeal from the decree of J. H. Nelson, District Judge of South Arcot, dated 21st May 1881, confirming the decree of Ádiappa Chetti, Subordinate Judge at Cuddalore, in Suit 88 of 1880.

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* Second Appeal 697

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MARI v. CHINNAMMÁL.

The facts appear from the judgment of the District Court, which was as follows:—

"The plaintiff appeals against the decree of the Lower Court dismissing his suit for the recovery of the possession of certain immovables recently possessed and enjoyed by his divided nephew Gopál Padayáchi, and, after the death of that individual, possessed and enjoyed by Gopál Padayáchi's stepmother, the present defendant No. 1.

"I see no reason to question the propriety of the Lower Court's decision, and accordingly affirm its decree and dismiss this appeal with costs.

"No doubt 'mother' includes 'stepmother,' and if the estate in dispute be regarded as that of the deceased Gopál Padayáchi, the defendant should take it in preference to the plaintiff.

"But in truth the estate should not be so regarded. Rightly and properly looked at, this is a joint family estate, the management of which has devolved successively upon Arunáchala Padayáchi, his son Gopál Padayáchi, and lastly upon the defendant.

"In Indian families ordinarily the most capable individual is made or becomes the managing member, and it chances not infrequently that the most capable member is a female. In the present case, upon the death of Gopál Padayáchi, the management naturally devolved upon his mother-in-law, and it is her duty as managing member to preserve the estate, provide herself with maintenance, suitably settle her daughter, and do various other acts.

"The plaintiff, having many years ago separated himself from this family, can have no concern now in its management and no right over the corpus so long as one of its members remains.

"The question of unchastity was not raised upon the pleadings, and the Lower Court did right in disregarding it."

On the 10th August 1882 the case was argued by *Rámá Ráu* for appellant and *Anandácharlu* for respondents, and judgment was reserved; and on the 2nd of February 1883 the Court (Kernan and Muttusámi Ayyar, JJ.) remitted the following issues to the District Court for trial:—

"i. Whether defendant No. I, stepmother of Gopál deceased, married again after the death of her husband.

"ii. Whether in Southern India, by usage prevailing or by the usage of the caste of the parties, a stepmother is

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entitled at all to succeed to the inheritance of her stepson, and, if so, is she so entitled before his paternal divided uncle."

On the 23rd April 1883 the District Judge (J. Hope) returned the following findings on these issues:—

"It is admitted on both sides that defendant No. 1 did not marry again after the death of her husband, the father of Gopál Padayáchi.

"The Vakíl for the respondents Nos. 1 and 3 states that he has no evidence to prove that, either by usage prevailing in Southern India or by the usage of the caste of the parties, a stepmother is entitled to succeed to the inheritance of her stepson; nor has he any authorities to cite in support of the contention. It has been ruled that in competition with a sapinda of the deceased, a stepmother cannot succeed—*Kumaravélu* v. *Virana Goundan*(1).

"Both issues referred by the High Court are therefore found in the negative."

On the 8th August 1883 the following judgments were delivered:—

KERNAN, J.—The plaintiff is the paternal uncle of Gopál Padayáchi, who died without issue and without leaving a wife.

The father of Gopál, Arunáchalam, was brother of the plaintiff, and these brothers and their families were divided.

Arunáchalam was married twice. Gopál was the son of the first wife and she died before Gopál.

Defendant No. 1, Chinnammál, is the second wife of Arunáchalam and stepmother of Gopál, and she had not any child by her husband.

Defendant No. 2, Ménákshi, is her daughter, but not a daughter of Arunáchalam. On the death of Arunáchalam, his son Gopál became possessed of the property allotted to his father on partition. Gopál and his father were not divided.

On the death of Gopál, defendant No. 1, as his stepmother, took possession of his property.

This suit has been brought to recover this property from defendant No. 1.

(1) I.L.R., 5 Mad., 29.

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The Múnsif held that defendant No. 1, as stepmother of Gopál, is entitled to hold the property. The District Judge held that a stepmother, as a mother within the Hindú law, is entitled, as such, to succeed to property, and that, if the property belonged to Gopál, she should be entitled to hold it. He also held that the property of Gopál was joint family property, and that defendant No. 1, as manager of the joint family, was entitled to hold the property and maintain herself and her daughter, and that, as the plaintiff was separated from Arunáchalam and his family for many years, he has no claim to the property.

The District Judge does not say who the members of the *joint* family to which he alludes are, either by general or individual description. We do not see that Gopál was at his death the member of any joint family.

The defendant No. 2 is not a member of his family. If the defendant No. 1 is entitled to the property, there is no one, so far as appears on the record, who is a member of any joint family with her. We entirely dissent from the judgment of the District Judge on this point. Gopál died divided from the rest of his kinsmen.

The next question is whether the defendant No. 1, the stepmother of Gopál, is entitled to his property.

On this subject there is a decision exactly in point, which must govern, in 3, Indian Jurist, p. 551—*Kumaravélu* v. *Vírana Goundan*(1).

In the judgment it is said of the stepmother, who claimed to succeed to her son, that a divided childless Hindú is not a "mother" within the meaning of Mitákshará, ch. ii, s. iii, and that the word "mother" includes only the natural mother. It is also said that, as against a sapinda, it is clear she cannot succeed to the estate of her stepson.

We agree in that decision, for which there are many authorities. However, the Court then went further, and it is then said, "she does not participate in the offerings of the stepson to his father." She is not a sapinda, therefore, in the sense of being connected with the funeral cake (Dáyabhága, ch. xi, s. vi, sloka 3), nor is she sapinda or of one body with her stepson in the Mitákshará sense.

(1) I.L.R., 5 Mad., 29.

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We have been pressed by Mr. *Anandácharlu* to refer the matter to a Full Bench as a case of much general importance. Very many arguments have been adduced to show that a stepmother is a sapinda of her deceased stepson.

I should wish to see this question decided on full argument; but I do not feel sufficient doubt on the subject to say that it ought to be submitted to a Full Bench, though, if Mr. Justice Muttusámi Ayyar thinks well of it, I am willing to do so. I have not seen S. A. 624 of 1881, referred to by Mr. *Anandácharlu*, nor S. A. 163 of 1874, referred to by Mr. *Rámá Ráu* and by the Court in 3, Indian Jurist, p. 554.

MUTTUSÁMI AYYAR, J.—I concur. The parties to this appeal are Padayáchis by caste. The plaintiff, Mari Padayáchi, had a brother named Arunáchala Padayáchi, who died leaving a son, Gopál Padayáchi, by his first wife, and defendant No. 1, his second wife. Arunáchala had divided from his brother, the plaintiff, and, upon his death, Gopál succeeded to his property. Gopál died unmarried, and plaintiff claimed his property as his heir under the Hindú law.

Defendant No. 1 pleaded an oral bequest by Gopál in her favor and that of her maiden daughter, defendant No. 2, and further contended that, under the Hindú law, she was entitled to take her stepson's property in preference to his paternal uncle, the plaintiff. The Subordinate Judge refused credit to the evidence produced by defendant No. 1 to establish the nuncupative will set up by her, but he considered that the word "mother" in the Mitákshará included a stepmother, and dismissed the plaintiff's suit. At the final hearing in the Court of First Instance, the plaintiff imputed want of chastity to defendant No. 1, but the Subordinate Judge declined to entertain the plea, observing that, if her subsequent misconduct deprived her of her right of succession, the suit ought to have been so framed.

On appeal, the District Judge agreed in the opinion that the word "mother" in the Mitákshará included the stepmother, but considered the estate as a joint family estate, of which the management devolved successively, first on Arunáchala Padayáchi, then on his son Gopál Padayáchi, and lastly upon the defendant No. 1. He observed also that the question of unchastity was not raised by the pleadings, and dismissed the appeal.

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As Gopál Padayáchi was a divided nephew, I do not think that we could regard his property as common to him and to the plaintiff, but I agree with the Judge that the question of want of chastity was not raised by the pleadings. The substantial question, therefore, for decision is whether the word "mother" in the Mitákshará includes the stepmother, and, if not, whether she is a gotraja sapinda entitled to succeed to Gopál in preference to his uncle according to the Mitákshará law. It was held by this Court in Second Appeal 565 of 1878(1) that a stepmother was not a sapinda; that the word "mother" in the Mitákshará did not include the stepmother; and that, as against a sapinda, she could not succeed to her stepson. In that case the Court observed as follows: "She does not participate in the offerings of the stepson, and she is not a sapinda therefore in the sense of being connected by the funeral cake (Dáyabhága, ch. xi, s. vi, sloka 3), nor is she sapinda or of one body with her stepson in the Mitákshará sense" (West & Bühler, 174). The very reason assigned in the Mitákshará, ch. ii, s. iii, slokas 3–5, for the preference of the mother over the father as immediate successor to the son, shows that the natural mother is intended in that passage. A Full Bench decision of the Calcutta High Court, *Lalla Jotee Lall* v. *Mussamat Duranee Kooer*(2), decides against her right to succeed. Reference was also made to S. A. 163 of 1874 of this Court. In that case, the appellant, a stepmother, sued to eject a tenant who held under her stepson, but the tenant pleaded a holding under a sapinda in answer to the claim, and her suit was dismissed. As there is, however, no judgment on record, the reasons on which her claim was disallowed cannot now be ascertained with precision. In S. A. 624 of 1881(3) a stepmother claimed to succeed to her stepson in preference to his paternal grandmother. Following the decision in S. A. 565 of 1878, the Court dismissed her suit, though it was then observed that she might be a bandhu. The Full Bench decision of the High Court at Calcutta proceeded on the view that the words "mother" and "grandmother," as used in the Mitákshará in connection with inheritance, did not include stepmother and step-grandmother. Adverting to the contention that the word

(1) I.L.R., 5 Mad., 29.
(2) Vyavasthá Chandriká, vol. i, p. 653; s.c. B.L.R., sup. vol. 67.
(3) I.L.R., 5 Mad., 32.

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"mother" in the Mitákshará, ch. i, s. vii, sloka 2—where a share is allotted to her on the occasion of partition among sons after the decease of their father—includes stepmother, the Court observed that though the word "mother" may include stepmother in some cases, it does not do so in all cases. This was a suit in the Mithila country, and it was decided under the Mitákshará law as the Viváda Chintámani of Váchespati Misra, which is a work of special authority in the Mithila School, contained a special rule on the subject. In *Lakshmi Bái* v. *Jayram Hari*(1), however, it was held that wives of gotraja sapindas have rights of inheritance co-extensive with those of their husbands, and that they succeed after them. In that case, the competition was between the widow of the great-grandson of the deceased's paternal grandfather's grandfather, and the male heirs who were fifth in descent from the father of the same ancestor. In decreeing the widow's claim, Mr. Justice Melville referred first to Mitákshará, ch. ii, s. v, sloka 5, wherein the paternal great-grandmother is declared to be an heir, and then to the opinion of the commentator, Visvésvara Bhatta, the author of the Subhodini, viz., that by a logical interpretation of the Mitákshará, the wives of all sapindas and samánodakas have rights of inheritance co-extensive with those of their husbands.

Sir Thomas Strange observes that stepmothers are no heirs, and refers in support of his opinion to Manu, ch. ix, s. 185, and to Dáyabhága, ch. xi, s. vi, slokas 3 and 4.

In support of this second appeal it is argued that the word "mother" in ch. i, s. vii, includes stepmother; that she is not only connected with funeral offerings, but that she is also a sapinda in the Mitákshará sense of the term; that she is, at all events, entitled to succeed to her stepson as a gotraja sapinda in preference to his paternal uncle; and that we should refer this case to a Full Bench, as the question is one of general importance.

There can be no doubt that the word "mother" either in Mitákshará, ch. ii, s. iii, slokas 1, 2 or 5, does not include the stepmother. In sloka 5 the ground of her preference to the father is said to consist in her not being, unlike the father, a common parent to other sons. Prior to the date of the Mitákshará there was a school

(1) 6 Bom.H.C.R., 152.

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of lawyers represented by Dhárésvara, who contended that even the paternal grandmother excluded the father in order that the inheritance might not pass to sons dissimilar by class or of another tribe. This might be said to explain why the natural mother was originally preferred to the father, and why the stepmother was not admitted as heir along with her (see Mitákshará, ch. ii, s. iv, sloka 2). Nor can the contention that the word "mother" in sloka 1 includes stepmother be upheld. The word "pitarau" in Yájnavalkya's text, which the Mitákshará resolves into mother and father, is an irregular compound. According to the method of Sanscrit grammarians, a compound is formed in a regular way either by cumulation with the conjunctive particle expressed after each noun, as in "mátacha pitacha," or by reciprocation with the conjunctive particle implied, as in the compound word "máta pitarau." It is formed in an irregular way by the retention of the second noun and the omission of the first noun, the conjunctive import being denoted by the plural termination as in the word "pitarau." According to the emendatory rule of Kátyáyana as to the formation of compounds, the more revered object is to be placed first. Interpreting, then, the word "pitarau" in Yájnavalkya's text with reference to these rules of Panini and Kátyáyana, the mode in which the Mitákshará resolves the compound word is in accordance with the Sanscrit grammar. That it is so is also evident from the word "mother" being placed before the word "father" in Patangili Mahábáshika, the greatest work in existence on Sanscrit grammar (see Stokes, H.L.B., 442). Whatever doubt there might be as to whether Yájnavalkya used the irregular compound "pitarau" with reference to the exigencies of the verse, as hinted by Dr. Burnell in his introduction to Vyavahára Nirnaya, or with reference to the superior claims of the mother to reverence, there can be no room to doubt that the author of the Mitákshará took it in the latter sense, since he interprets it according to the method of grammarians. This may not, however, be conclusive, for all the leading commentaries in Southern India dispute the mother's priority of claim. In Smriti Chandriká, ch. xi, s. iii, sloka 9, the father is preferred to the mother, and in Madhaviya, s. 38, the conflicting smritis on the subject are mentioned, and the commentator remarks that what is proper should be admitted. The only legal mode of determining what is proper where the

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smritis conflict with one another is a reference to approved usage. In ch. iv, s. viii, para. 14, Nilakanta, the author of the Vyavahára Mayukha, places the father before the mother and questions the rule of priority prescribed by the Mitákshará. In the Vyavahára Nirnaya of Varadarájá, a native of the Tamil country who lived at the end of the sixteenth century, both parents are said to inherit on the authority of the text of Manu (see page 36).

In Smriti Chandriká, ch. xi, the commentator mentions the several arguments in connexion with the prior claim of the mother and refutes them all.

I. As to the argument that the mother confers greater benefit on her son, because she bears him in the womb, nurtures him during his infancy, and because a mother is said to surpass a thousand fathers in veneration, he observes that the father too benefits the son and imparts knowledge to him, and cites a text which says, "of the two, the father is pre-eminent because the seed is considered important."

II. He next adverts to the argument of the Mitákshará that the father is a common parent to the sons of a rival wife, while the mother is not so, and characterizes it as mere prattle, adding that, as between a mother and a father, there can be no distinction in respect of propinquity to the son. As to the argument that the word "mother" stands first when the irregular compound "pitarau" is reduced to the regular compound "máta pitarau," he declares that it is insipid, and relies on the observation in the fifth chapter of the Mimamsa in connexion with the irregular compound Sárasavatau (two sacrifices) that there is no rule apparent in the word itself as to the order in which the two sacrifices are to take place. He then proceeds to notice the theory of Srikara that both the father and mother inherit together and divide the heritage between them, and rejects it on the ground that distinct rights, quite independent of each other, are created in the parents. As to the last argument, that a uterine brother is preferred on account of the uterine relation consequent on the community of the womb, the author of the Smriti Chandriká says that "it is an argument as weak as the support of a Kusa grass," and that, although one may be more attached to his uterine than to his half-brother, he is unable to conceive how a mother could become thereby a preferable

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heir. This strong condemnation of the interpretation placed by the Mitákshará on the word "pitarau," and of the reasoning in its support in a work of special authority, and in other commentaries prevalent in the South, countenances the contention for the appellant that it is unsafe to adopt the interpretation and reasoning in the Mitákshará as conclusive on the subject of the stepmother's right to inherit.

As to the sense in which Yájnavalkya used the word "mother," all the commentaries, including the Mitákshará, interpret it as including stepmother in the chapter on "Allotments to be made to women on the occasion of partition among sons after the decease of their father" (see Mitákshará, ch. i, s. vii, sloka 1; Smriti Chandriká, ch. iv, s. 14; Madhaviya, s. 22; Vyavahára Nirnaya, page 10). There are also several smritis in which a stepmother is said to be equal to a mother. Manu says in ch. ix, 183: "If among all the wives of the same husband, one brings forth a male child, all are mothers of male issue." Vyása says: "Childless wives of the father are declared to be equal sharers, and all grandmothers are declared equal to the mothers" (Madhaviya, s. 22). Vishnu says: "Mothers receive allotments according to the shares of sons" (Smriti Chandriká, ch. iv, s. 14). Brahaspati says: "Their [sons'] mothers get equal shares" (Vyavahára Nirnaya, p. 10). Though all these smritis refer to allotments to be made to women on the occasion of partition among sons, they nevertheless show that the word "mother," as used in smritis, may include a stepmother. As to her status in relation to funeral oblations, it is no doubt stated in Dáyabhága, ch. xi, s. vi, sloka 3, that stepmothers do not participate in the funeral offerings, and that the introduction of stepmothers at the periodical obsequies is expressly forbidden. A text is also cited to the effect "that whosoever die, whether man or woman, without male issue, for such person shall be performed funeral rites peculiar to the individual, but no periodical obsequies." The practice, however, obtaining in Southern India is at variance with this text. Stepsons not only perform their stepmothers' funeral ceremonies in default of natural sons, but they also perform their annual sradhas. If the first wife dies childless, the husband performs her funeral and sradha, and if he marries after several years a second wife and gets a son by her, the duty of performing the first wife's sradha is

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transferred from him to the stepson directly the latter is invested with the sacrificial thread and thereby enabled to perform religious rites. Furthermore, if there are several stepsons and the one performing the sradha for their stepmother dies, the duty devolves in practice on the surviving senior stepson. Again, both the stepson and stepmother are under pollution on each other's death for a period of ten days, as is the case with sapindas within seven degrees. According to ceremonial law, stepmothers assist their husbands, in default of natural mothers, in performing the ceremonies prescribed for the upanáyanam or investiture of a stepson, or for the bestowal in marriage of a stepdaughter. This practice is founded upon Vythinátha Díkshatiyam, a work of authority on ceremonial observances in this part of the country, and he obviously carries out the principle, which is still binding in the case of adoption, that the son of a man by one of his several wives is the son of all (Manu, ch. ix, s. 183). Her son is a sapinda as half-brother, and her husband is a sapinda as father, and to both these she is a sapinda.

According to the practice, therefore, in Southern India, I do not see my way to saying that a stepmother is not a sapinda or a female sapinda having no connexion with funeral oblations and annual sradhas. Nor does she appear not to be a sapinda in the Mitákshará sense of the term. In this sense, brothers' wives are said by the author of the Mitákshará himself to be sapindas, because by union with their husbands, they produce sons who are connected with one body, that is to say, the body of their grandfather, and the reasoning would apply with equal force to stepmothers. As in the case of women, their gotras are changed by marriage from the gotra of their father to those of their husbands; a stepmother is a gotraja sapinda and she cannot be said to be sprung of a different family within the definition of a bandhu contained in the Mitákshará, ch. ii, s. v, sloka 3, for by marriage she is, by a fiction of law, born again in the family of her husband, and if, therefore, she is not a gotraja sapinda, she is not also a bandhu.

Turning next to the general principles of Hindú law as to the succession of women as gotraja sapindas, the first that deserves attention is the Vedic rule of exclusion of women from inheritance. This is founded upon a passage in the Taittiriyam or the

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Black Yajurveda that females and persons wanting in an organ of sense or member are incompetent to inherit (Smriti Chandrika, ch. iv, s. 6).

With reference to the sutras of Baudáyana and Ápastamba, the reason of this rule is mentioned in Mitákshará, ch. ii, s. i, 14, to be that, since the wealth of a regenerate man is designed for religious uses, the succession of women to such property is unfit because they are not competent to the performance of religious rites. An explanatory text in the Black Yajurveda declares women to be "Nir Indria" (see Vyavahára Nirnaya, p. 41). As to the extent in which this Vedic rule influenced the interpretation of smritis which recognized the right of women, the Mitákshará refers to the opinion of Dhárésvara and others who lived before him as referring the smritis to appointed daughters and appointed wives (Mitákshará, ch. ii, s. i, 15).

As to the scope of the rule of exclusion as part of the law now in force, the Dáyabhága School differs materially from the Mitákshará School. In the former, the rule is still recognized to be of general import, and the right to succeed is allowed only in the cases of those women who are expressly mentioned in smritis. In Dáyabhága, ch. xi, s. vi, sloka 11, Jímúta Váhana cites Baudáyana in support of the general rule, adds that the succession of the daughter, the widow, the mother, and paternal grandmother takes effect as an exception under express texts, and excludes widows of their great-grandfather and of remoter ascendants from succession. In the table of heirs appended to the Dáyakrama Sangraha, the paternal great-grandmother is also included; the Vedic rule of exclusion being, however, admitted to be of general import. But in the Mitákshará and in all the commentaries in the South the rule is not admitted to be of general import, but is limited to property expressly obtained for the purpose of sacrifices (Mitákshará, ch. ii, s. i, sloka 26; Smriti Chandriká, ch. xi, s. i, sloka 22; Madhaviya, s. 44; Vyavahára Nirnaya, p. 41).

Thus the Vedic text being no bar to the succession of women under the Mitákshará law except as to property obtained expressly for the purpose of sacrifices, the general principle that the nearest sapinda succeeds applies as well to women as to men. The only question then is whether, as suggested in Subhodini and followed by the Bombay High Court, it applies to the wives of all

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gotraja sapindas, or whether it is confined to the widows of ancestors in the line of ascent as mentioned in the Mitákshará, ch. ii, s. v, sloka 5. If the difficulty arising from the position of the mother, grandmother, and great-grandmother before their husbands, and from the reasoning in support of the mother's claim to preference were out of the way, it would be reasonable to construe the word "mother" as the father's wife, and to hold on the analogy of the natural mother taking before the brother that the stepmother as a gotraja sapinda would inherit to her stepson before her own son. Judging by the other commentaries which are works of special authority in Southern India, there is no evidence of consciousness in the country that the interpretation of the word "mother" in the Mitákshará is adopted by the people.

It may be going too far to follow the decision of the Bombay High Court, as the author of the Mitákshará does not mention any women in the case of collateral female sapindas, and, as in practice, brothers' widows do not inherit. In Mitákshará, ch. ii, s. iv, sloka 4, the sapinda relationship is said not to be restricted to kinsmen allied by funeral oblations or connected by libations of water, but also to extend to other relatives when they appear to have a claim to the succession. Having regard to Dr. Mayr's dissertation on the mode in which the widow's right of succession grew up historically out of her right to an allotment for maintenance (Mayne on Hindú Law, s. 446), and to the fact that daughters, mothers, stepmothers, grandmothers were alone entitled to allotments, it is not improbable that the right of succession is limited by analogy to widows, daughters, mothers, and step and grandmothers, who, with other female lineal ancestors, are equal to mothers. This view is confirmed by the fact that although women are entitled to inherit as sapindas under the Mitákshará law, their heritage is in the nature of allotments directed to be made to women on partition. As pointed out in my judgment in the *Shivaganga case*(1), the text of Kátyáyana and Brahaspati, which let in women as heirs, reduced their heritage to a provision for life, by rendering their succession a case of interposition among male sapindas and depriving them of the power of alienation except under necessity. It should here be observed that the allot-

(1) I.L.R., 3 Mad., 323.

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ments prescribed for women consisted originally of specific shares of the property under division and not of a bare provision for maintenance or expenses of marriage. As to Dhárésvara's suggestion that the mother and grandmother were preferred to shut out from succession sons dissimilar in class, it is expressly repudiated in Mitákshará, ch. ii, s. iv, sloka 3, and the practice of marrying women belonging to a different class has ceased to prevail. It does not, therefore, seem to me unsafe to recognize the right of succession to extend, at least, to those gotraja female sapindas who were entitled to allotments on the occasion of partition on the ground that there are indications of the right of succession in the case of women being assimilated to their right to allotments and having probably grown out of it.

On these grounds it appears to me that the contention in support of this appeal that a stepmother is included in the term "mother" in Yájnavalkya's text, and that the Mitákshará nowhere expressly excludes her, and that she is entitled in principle to inherit, seems to be weighty. I would, therefore, refer the question for the consideration of the Full Bench. It is, at all events, desirable to enquire, before overruling the contention, whether, according to usage, stepmothers inherit in southern districts either generally or in the caste to which the parties to this suit belong.

The case was accordingly argued before a Full Bench on 12th October 1883.

Hon. *Rámá Ráu* for appellant.

Anandácharlu for respondent.

On the 7th October 1884 the following judgments were delivered:—

TURNER, C.J. (KERNAN and HUTCHINS, JJ., concurring)—Gopál Padayáchi, the owner of the property in suit, died leaving a stepmother, a half sister, and a paternal uncle. The paternal uncle has claimed the succession, and, inasmuch as he is admittedly entitled, in the absence of nearer heirs, it lies on the stepmother, who disputes his claim, to prove that she is an heir and entitled in priority to the paternal uncle.

It is argued on behalf of the stepmother that she is entitled to inherit as a mother, and that, if she is not included as a mother in the line of heirs, she succeeds as a gotraja sapinda.

The claim of the stepmother to succession, as a mother, has

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been asserted on the following grounds. The sloka "If among all the wives of the same husband one brings forth a male child, all become mothers of male issue by means of that son" (Manu, ix, 183), shows that the term "máta" is not a merely honorific title when applied to a stepmother; that it indicates a relationship entailing consequences peculiar to itself, and that, in a system of law which in matters of inheritance recognizes artificial relationships, as in the case of the adopted son, there is no reason for refusing to the stepmother the temporal as well as the spiritual advantages which admittedly accrue to her from the birth of a male child to a fellow wife. It is not asserted that her claim would obtain in competition with that of the natural mother. The doctrine of remoteness, which postpones the half-blood to the full-blood, would secure to the natural mother priority, but it is contended that, where there is no such competition, the claim of the stepmother to succeed as a mother must be conceded.

To support this argument, reliance is placed on the passage in the Mitákshará, ch. i, s. vii, slokas 1, 2, which, quoting a text of Yájnavalkya—"Of heirs dividing after the death of the father, let the mother also take an equal share"—prescribes that a share is to be allotted to the wives of the father on a partition made by the sons after the father's decease. It is argued that the term "máta" in this text includes the stepmother as well as the mother, and indicates their equal claims, of which the sole ownership has, by the decease of the father, vested in the sons.

Again, it is argued that the part which devolves on a stepson in relation to his stepmother under the ceremonial law, indicates that his connection with her is that of a son. On him, in preference to the husband, devolves the duty of performing the funeral ceremonies of his stepmother. Moreover, a stepmother may confer spiritual benefits on a stepson; she may become the mother of a brother who will offer oblations to three ancestors in which the stepson would participate (Dáyakrama Sangraha, ch. i, s. vi, sloka 2). Hence it is concluded we are to infer that, in the text which declares that the mother is the heir of a man who dies without issue, the stepmother also is included. If, on the other hand, she is not entitled to succeed as a mother, it is contended that she is so as a gotraja sapinda. By marriage she becomes half the body of her husband, and because she, with her husband, may beget and bring forth a sapinda, she is a sapinda of her husband, and, through

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him, of her stepson, and, having by her marriage been born again in the gotra of the husband, she is a gotraja sapinda of her stepson and entitled to succeed as a less remote sapinda than the paternal uncle.

It will be seen that the claim of the stepmother to succeed as mother is rested on the argument that the term "máta" is used by commentators to include a stepmother, that she enjoys equal advantages with a natural mother on a partition of the family estate, and that, in spiritual matters, she derives from, and may confer on, her stepson spiritual benefits.

The sloka of Yájnavalkya which declares the rule of succession to the separate property, whether self-acquired or obtained by partition, of a man who leaves no issue, gives the succession after the widow to the "pitarau," a word originally "máta pitarau"—a compound of the terms mother and father, which is interpreted by some writers "both parents," by others "the two parents." The use of a word in the dual number would, at first sight, appear to fix the meaning of the term mother and confine it to the natural mother. It is, however, not impossible that the term mother may be used collectively and imply all those to whom it can be applied in the sense of maternal parent. It may be admitted that the term "máta" is so used in some smritis. Thus in the sloka of Brahaspati "On the death of the father, the natural mother, *janani*, has a claim to an equal share with her own sons; mothers, *mátarah*, take the same share, and the daughters each a fourth share" (Colebrooke's Dig., Bk. V, ch. ii, s. 85). Here the term "máta" clearly means stepmother as opposed to natural mother, and the commentator allows that the use of the term in that sense is not singular. But the instance which is selected from Mitákshará, ch i, s. vii, slokas 1 and 2, is not one in which it can be said the construction of the term as including stepmother is undisputed.

It was asserted at the hearing that Colebrooke's translation of this passage was inaccurate, and the passage was rendered as follows from an edition produced in Court: "If there is a division after the father's death, wives take a share equal to that of their own sons," and this appears to be the sense in which it was understood by those commentators who held that it recognized the right to a share on a partition by sons only in the mothers of male issue and that childless mothers derived a right to maintenance from the sloka of Yájnavalkya 2, 143: "Their childless women who are

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well behaved are to be supported" (see Mitákshará, ch. ii, s. i, sloka 13; Viromitradáya, ch. ii, pt. I, s. 19; Dáyakrama Sangraha, ch. vii, ss. 3-5). Jímuta Váhana interpreted the term "mother" in the sloka of Yájnavalkya as applying only to the natural mother (Dáyabhága, ch. iii, s. ii, § 30).

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Jaganátha, on the other hand, held that stepmothers, on a partition by sons, if they have no male issue, should receive the same shares as they would have received if they had had sons.

The commentators whose works are of authority in Southern India interpreted the sloka as including stepmothers (Smriti Chandriká, ch. iv, s. 14; Sarasváti Vilása, ss. 108, 109; Dáyavibhága, s. 22); and Varadarájá quotes the sloka of Vyása, "Childless wives are declared to be equal sharers and grandmothers; they are all declared to be equal to mothers"—Nirnaya (Burnell), p. 10.

It may then be conceded that in this Presidency the sloka on which Mr. *Anandácharlu* relies may be cited as an authority for the proposition that the term mother may include stepmother. It must not, however, be overlooked that the right of a mother to a share was regarded by Nanda Pandita, not as a right of heritage, but a right to a provision. Account was to be taken of property which she had already received, and, if it was insufficient for her maintenance, an allotment was to be made to her so as to provide her with a sufficiency for her wants, which allotment could never be in excess of a son's share, but which would be less than a son's share if the property was so large that a son's share would more than suffice for her needs (Smriti Chandriká, ch. iv, ss. 9-17). Although the Madhaviya disputes the correctness of the opinion that mothers are not entitled to a share, but only to so much as may be necessary for their maintenance (Dáyavibhága, s. 22), the doctrine of Nanda Pandita is noticed without dissent in the Sarasváti Vilása, s. 114, and has become established law in this Presidency (Mayne, Hindú Law, s. 402).

The limitation "equal to that of sons" has reference, in all probability, to the rule obtaining when marriage was permitted with women of different castes. Sons making a partition did not, unless they were of equal caste, take equal shares. Their shares were regulated by the dignity of the caste to which they belonged. In prescribing, then, that wives should take shares equal to that of their own sons, it was probably meant that the share of a wife should not be greater than the share her son would have taken

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according to his rank among sons. A similar interpretation has been placed on the text of Vishnu, ch. xviii, s. 34: "Mothers shall receive shares proportionate to their sons' shares" (Dig., Bk. V, ch. ii, s. 86).

It would be unsafe, then, to conclude from the provision made for wives on a partition effected by sons that there is recognized in them any heritable right in the estate of their stepsons. While the principle on which participation in the wealth enjoyed by their husbands admits stepmothers when a partition is made by sons, the principle on which priority is given to the claims of the mother over the father in the succession to a son excludes them. Admitting that the term "máta" has been occasionally used to include stepmother, and assuming that the term "pitarau" might be similarly construed, the sense in which it was intended the terms should be understood in particular passages must be ascertained from the context. From the employment of the compound term "pitarau" in the sloka which provided for the succession of parents, a difference of opinion arose among the commentators whether the mother or the father was entitled to priority of succession. Vijnanésvara and Visvésvara Bhatta supported the claims of the mother for the reason (among others) that the father might be a common parent to other sons (that is to say, to sons by other wives), but the mother not so, therefore her propinquity was greater than that of the father (Mitákshará, ch. ii, s. iii).

The same argument is adopted by the author of the Sarasváti Vilása, who also gave priority to the mother (ss. 568–598). It is obvious that the ground on which these commentators preferred the mother excluded the stepmother. Nanda Pandita and Nilakanta Bhatta, who prefer the father to the mother, both notice and contest the argument on the ground of propinquity, but do not meet it by what would have been a conclusive reply if a stepmother, in their opinion, was included in the term mother; while Jímuta Váhana, who also gives priority to the father, accords superiority to the mother over brothers, because it is necessary to make a grateful return to her for the benefits which she has personally conferred by bearing the child in her womb (Dáyabhága, ch. xi, s. iv, sloka 2); and both in this treatise and in the Dáyakrama Sangraha preference of the father to the mother is supported [among other arguments] by a reference to the slokas of Manu (ch. ix, 33—37) which accord superiority to the male sex by the

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illustration that the seed is more closely allied to the plant than the field.

The disinclination of Hindú lawyers to the descent of property to sons of a different class was the ground on which Dháresvara argued that the paternal grandmother was entitled to succeed in preference even to the father (Mitákshará, ch. ii, s. iv, sloka 2).

The sloka of Kátyáyana—"On failure of male issue, the father shall take the estate acquired by the son after partition, or the brother or the natural mother or the paternal grandmother in regular order" (Dig., Bk. V, ch. viii, s. 425)—excludes the stepmother, and, so far as has been brought to our notice, the only commentary which expressly allows the right of the stepmother is that of Lakshmidevi, who wrote under the name of Balambhatta, and whose work Mr. Justice West pronounces to be held in comparatively slight esteem (1 West & Bühler, 17).

The position which a stepmother enjoys in the family is explained by her relation to the father, and the argument that she and her stepson mutually confer on one another spiritual advantages would not be conclusive in this Presidency, where Hindú inheritance is not chiefly regulated by such considerations. The spiritual benefit which the birth of a son confers on a father may be shared by the mother's fellow-wife without necessarily involving a right on her part to share in the temporal advantages arising from the connection. It is not denied that the obligations of a stepson to a stepmother in matters of religious ceremony differ widely from those of a son to his natural mother. It is his natural mother and her ancestors that he names when performing the sradhas of his father. In respect of pollution consequent on death, there are differences between the honor paid to the memory of a mother and that of a stepmother. The right to perform the funeral ceremony does not involve a mutuality of right of succession. The daughter-in-law may perform the funeral of her father-in-law, yet this right does not constitute her his heir in this Presidency. On the other hand, the spiritual benefits which a stepmother may confer on a stepson are certainly not higher than are conferred by a daughter-in-law on a father-in-law, yet no right of inheritance is, on this ground, accorded to the daughter-in-law.

Sir Thomas Strange, who must have been acquainted with the law administered in this Presidency from the commencement of the century, declared that stepmothers, where they existed, were

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excluded. Sir W. Macnaghten, in his notes on the earlier decisions of the Sadr Dewáni Adálat, which recognized the right of the stepmother, expressed doubt of their correctness (Select Cases, 39, 42), and a Full Bench of the Calcutta High Court, in a case governed by the Mitákshará, negatived the stepmother's claim —*Lala Joti Lal* v. *Durani Kower*.(1)

In this Presidency decisions to the same effect were pronounced in S. A. 163 of 1874 by the late Chief Justice and Mr. Justice Holloway, in *Kumaravélu* v. *Virana Goundan*(2) and *Muttammál* v. *Vengalakshmi Ammál*(3). The claim of the stepmother to succession has been allowed only in Bombay, *Kesserbái* v. *Valab Ráoji*(4), and in the judgment in that case it was admitted that "she is not included by the Mitákshará within the term mother," and that "she cannot, in the Presidency of Bombay, be included in the term mother." Her right was allowed because she was the wife of a gotraja sapinda and therefore a gotraja sapinda herself.

Whether regard be had to the writings of commentators regarded as authoritative in this Presidency, or to decided cases, no support can be found for the claim of the stepmother to succeed as a mother. Although it has been alleged by the respondent's Pleader that he has ascertained that in practice her claim has been admitted, no instance was produced when the learned Judges by whom this case was referred remitted an issue for the express purpose of ascertaining usage. Possibly had the instances to which the learned Pleader referred been examined, it would be found that the stepmother owed her advantage to the good feeling of the heirs rather than to an intelligent recognition of her right.

It remains to be considered whether she can maintain her claim as a gotraja sapinda. It must be admitted that, on the principle of sapindaship, which has been accepted by commentators of authority in this Presidency, the wife is a sapinda of her husband [Mitákshará, Áchávakánda, f. 6, p. i, l. 15 (*a*)] and of her stepson; but the question remains whether she is a gotraja sapinda, and, if she be a gotraja sapinda, whether female gotraja sapindas are included in the line of heirs.

If the stepmother is entitled to succession because she has by her marriage entered the gotra of her husband and has become a

(1) B.L.R., sup. vol., 67.
(2) I.L.R., 5 Mad., 29.
(3) I.L.R., 5 Mad., 32.
(4) I.L.R., 4 Bom., 208.
(*a*) 1 West & Bühler, 141.

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sapinda of her husband, then, on the same grounds, a right of inheritance must be claimed for the wives of all gotraja sapindas. This right has been recognized in the Presidency of Bombay in a series of decisions. In a recent case which came from that Presidency before the Privy Council, their Lordships had occasion to examine the authorities and to consider the grounds on which the claim could be supported, and their conclusion is thus expressed: "Perhaps the most that can be said is that the text of the Mitákshará is not inconsistent with the claim of the widow and allows of an interpretation favorable to her right to inherit. The important point for consideration remains, namely, whether such an interpretation of the Mitákshará has been given by its expounders and the lawyers of the Bombay School, and has been so sanctioned by usage and decisions, as to have the force of law."

Adverting to the opinions of Visvésvara and Balambhatta that gotraja may properly be taken to include males and females; to a passage in a note of Mr. Colebrooke that Vijayantra, a commentator on Vishnu, preferred a son's widow to a daughter; to the course of the decisions of the Bombay Courts, and to the opinions expressed by the learned Judges of that High Court that the admission of females to the order of succession was in accordance with the usage prevailing in the Presidency; their Lordships saw no satisfactory grounds for dissenting from the conclusion of the High Court that the doctrine which had actually prevailed in Bombay was in favor of the right of the widow, nor any sufficient reason for holding that the doctrine which had so prevailed should not have the force of law—*Lallubhái Bappubhái* v. *Cassibhái*(1). It will be seen that their Lordships were of opinion that no certain inference was to be derived from the text of the Mitákshará, and that their decision rests on the interpretation accepted by the Bombay School and mainly on the usage prevailing in that Presidency.

Although the author of the Mitákshará did not yield full assent to the rule of the Taittiriyam that females are incompetent to inherit—and the rule has been by other commentators respected in this Presidency, restricted to wealth obtained for sacrificial purposes—the rule is never altogether lost sight of. Special reasons are given by Vijnanésvara for the succession of the wife, the daughter,

(1) I.L.R., 5 Bom., 124.

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the mother and the grandmother, and the only ground on which it can be claimed that he recognized generally the competency of women to inherit, is the express mention of the paternal great-grandmother and the inferred admission of the wives of more remote ancestors in the direct line. On the other hand, although the persons mentioned as gotraja and bhinnagotra sapindas are not an exhaustive enumeration of those classes, it is noticeable that no mention is made of the wives of collaterals nor of any other female in those classes except the paternal grandmother and great-grandmother. It is obvious that their sapindaship with the *propositus* is altogether different in kind from that of the wives of collaterals.

The paternal grandmother is introduced in virtue of the sloka of Manu, and a place is assigned to her by Vijnanésvara in the line of succession not by reason of her sapinda connection as wife of the grandfather, but in virtue of the sloka; otherwise she would be postponed to the paternal grandfather, and the priority enjoyed by the great-grandmother over the great-grandfather, and of the other female ancestors in the direct paternal line over their husbands, can be explained only on the ground that they were regarded as equal to mothers. Of the commentators of authority in this Presidency to whose works we have access, while Vijnanésvara uses the term gotraja as belonging to the family, Nanda Pandita asserts that it refers to males alone and means only those who are by natural birth born in the family. He consequently denied that the grandmother was a gotraja, and, differing from Vijnanésvara, he assigned a place to her in the line of succession immediately after the mother. The author of Sarasváti Vilása, though he notices and condemns the doctrine of Nanda Pandita as to the place due to the grandmother, does not advert to the interpretation placed by Nanda Pandita on the term gotraja. He, however, includes the grandmother among gotrajas (s. 581), as does also the author of the Madhaviya, s. 41.

It is also to be noticed that, in the Sarasváti Vilása, the text of Manu quoted in Mitákshará, ch. ii, s. v, sloka 6, is given thus: "Sapindaship ceases with the seventh *male*," and similarly the author of the Madhaviya, "In default of sapindas, samanodakas take the property, and they are the seven *males* beyond the sapindas," &c. (s. 41). These passages lend strength to the opinion hitherto generally held in this Presidency that females were not

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admitted as heirs of males in competition with gotrajas except in virtue of express texts.

It was in advertence to the passage above referred to in the Smriti Chandriká of Nanda Pandita that in *Muttammál* v. *Vengalakshmi Ammál* (1) I expressed the opinion that a stepmother was not a gotraja sapinda, and that if she had a claim to inherit, it must be as a bhinnagotra sapinda. I should have confined myself to saying that I find no authority for holding that she is entitled to succeed as a gotraja sapinda.

No decision of the Sadr Adálat, the Supreme Court, or this Court has been cited, nor has any usage been proved by which a right of succession has been recognized as appertaining to a stepmother or to any of the females who, by marriage, have entered the gotra and acquired sapindaship solely through their husbands; for these reasons the claim of the stepmother as a gotraja sapinda has not been in my judgment established, and the claim of the paternal uncle must be allowed. The Court of First Instance held that the oral bequest pleaded by the first defendant was not proved. The claim for possession must be decreed; but, under the circumstances, I would dismiss the claim for mesne profits and direct the parties to bear severally their own costs in all three Courts.

MUTTUSÁMI AYYAR, J.—In the absence of evidence as to usage, I also see reason to concur in the opinion of the majority of the Court. The course of decisions is, as already explained in my first judgment, against the stepmother. As to the contention that the term "mother" in the Mitákshará may be taken to include stepmother, I am clear that it cannot at all be supported. Though I entertain no doubt that she is a gotraja sapinda in the Mitákshará sense of sapinda relationship, I do not think that all female sapindas are recognized to be heirs in this Presidency. For instance, brothers' and uncles' widows do not inherit. Though the author of the Mitákshará speaks of the Vedic rule of exclusion of women from inheritance as limited to property expressly granted for sacrifices, yet he gives no place in his compact series of heirs except to some females only whose claim is warranted either by special texts or special analogy. It may be that the analogy mentioned in Mitákshará, ch. ii, s. v, sloka 5, was not intended to extend as well to female ancestors of the half blood as to widows

(1) I.L.R., 5 Mad., 32.

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of collateral male heirs. I see therefore no sufficient warrant for saying more than that if usage were in favor of the stepmother's claim, the Mitákshará would be susceptible of the interpretation that there is legal origin for it. As to the ceremonial law or Acharakanda, it gives the stepmother a position only secondary to that of the natural mother, and is not of itself so decisive as to justify a departure from the course of decisions. I felt a difficulty in making up my mind because sisters have already been recognized to be entitled to succeed as bandhus. As a stepmother is, by marriage, of the same gotra with that of her husband, she cannot come in as a bandhu if she is not a sapinda, and thus there would arise the anomaly of a stepsister excluding the stepmother from succession. But on consideration, I come to the conclusion that this want of logical symmetry cannot be accepted as a sufficient warrant, in the absence of evidence of usage, for departing from decided cases.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1884. Oct. 22,28.

11 Mad. 452. 13 Do. 89. 26 Do 525. 34 Mad 493

SECRETARY OF STATE FOR INDIA (THIRD DEFENDANT), APPELLANT,

and

NÁRÁYANAN (PLAINTIFF), RESPONDENT.*

SÍTARAMÁ (FIRST DEFENDANT), APPELLANT,

and

NÁRÁYANAN (PLAINTIFF), RESPONDENT.*

Revenue Recovery Act, ss. 2, 25, 37—Sale for arrears of revenue—Liability of all fields included in pattá.

By accepting a raiyatwárí pattá, the landholder pledges each and every field included therein as security for the whole assessment.

Several fields separately assessed to revenue were held under one pattá by K. Default having been made by K in payment of revenue, one of such fields, of which N was the owner, was attached under the Revenue Recovery Act. N claimed to

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* Second Appeals 557 and 645 of 1884.

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have it released from attachment on payment of the assessment due upon it. The claim was rejected and the field sold.

Held in a suit by N to set aside the sale, that the sale was valid.

THE SECRETARY OF STATE FOR INDIA. *v.* NÁRÁYANAN.

THESE were appeals against the decree of F. H. Wilkinson, District Judge of South Malabar, reversing the decree of O. Chandu Menon, District Múnsif of Calicut, in Suit 845 of 1881.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (Muttusámi Ayyar and Hutchins, JJ.)

The Government Pleader (Mr. *Shephard*) for the appellant in S.A. 577.

Gopálan Náyar for the appellant in S.A. 645.

Anantan Náyar for the respondent in both appeals.

JUDGMENT.—This suit was brought by a jenmi to set aside a sale of his land for arrears of revenue. The plaintiff (Náráyanan Nambudri) had granted a kánam to Kandappan, defendant No. 2, and allowed the land to be entered in his pattá. In January 1881 he obtained a decree against Kandappan for its redemption. Meanwhile Kandappan had fallen into arrears to Government, and on the 11th February 1881 a demand had been served on him under section 25 of Act II of 1864, requiring him to pay the arrears due on his pattá, Rs. 16-0-9, within a fortnight. On the 28th March the land was attached for that sum under section 27. On the 16th April the jenmi, plaintiff, was put into possession under his decree. On the 30th April the sale of the land for the arrears was proclaimed, and on the 30th May the auction took place and Sítárámá Bhatta, defendant No. 1, became the purchaser. On the 14th May the plaintiff had put in a petition stating that he would pay what was due on this particular plot, but the Tahsildár refused to release the attachment unless all the arrears due on the pattá were paid with costs and interest. On the day of the sale the plaintiff actually tendered the full amount due on the land, but he was then too late. Section 37 of the Act requires that the amount be paid the day before the sale.

The District Múnsif at first decreed for the plaintiff, holding that he had tendered the arrears before sale. After a remand, and the Government having been made a party to the suit, he found that the tender had been only of the arrears due on this particular plot and that the sale was valid. On appeal the District

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Judge, after pointing out what he believed to be certain irregularities in the attachment and sale proceedings, set aside the sale on the ground that only 10 rupees were actually due on this particular plot, that plaintiff had tendered this sum and would have paid the batta, interest, and costs due on the plot if the Tahsildár had informed him of their amount.

It does not appear that there was any actual tender of money before the day of sale, which, as already mentioned, was too late: the plaintiff seems merely to have expressed his readiness to pay whatever was due on the particular plot. The judgment of the District Court does not proceed upon the ground that any irregularity had been committed, nor does it appear that there was any irregularity. The plaint did not allege any. The Judge was mistaken in supposing that the notice of attachment was not published in the district gazette (see Supplement V, 23rd April 1881, p. 6). The notices of demand (G) and attachment (H) both specify the arrears for which the land had been attached, as Rs. 16-0-9, and the question whether the plaintiff could not have obtained the release of the land by paying that amount, instead of the 63 rupees which had accrued due at the time of the sale, does not arise, for it is admitted that he did not tender that sum. The Board's Circular 109 is merely directory and would not invalidate a sale otherwise legal (*Stokes* v. *Venkatáchalam Chetti*).(1).

But the main question is whether the Government can sell a field for the arrears due on the entire pattá, or whether a person claiming an interest in that particular field can obtain its release upon payment of the proportionate arrears due on that field, or at all events its full assessment. Upon this point the decision of the District Court cannot be supported. Section 2 of the Act says that the land ..... shall be regarded as the security of the public revenue. Clearly something has to be supplied here: the land is the security for the revenue due on land only, and the question is, does that mean the particular field only or the entire holding? The answer is to be found in the following section: "Every landholder shall pay to the Collector the revenue due *upon his land* on or before the day on which it falls due, according to the

(1) S.A. 1040 of 1883, not reported.

kistbandi or other engagement." The land in his sanad or pattá is the security for the revenue due on *his land*, and the kists are calculated on the whole land and not on each field. By accepting his sanad or pattá he in fact pledges each and every field as security for the whole assessment, and he cannot split the security any more than an ordinary mortgagor. Section 25 leads to the same conclusion. Indeed it has never been denied in the case of a zamíndárí that each and every part of it is liable for the whole peshkash, and the Act makes no distinction in this respect between a zamíndárí and a raiyatwárí estate. The judgment of this Court in S.A. 1040 of 1883 quoted above is also to the same effect, though the point was not fully discussed.

We reverse the decree of the District Court and restore that of the Múnsif. It is perhaps a hard case, but the plaintiff should not have alleged fraud against the purchaser. He must pay the costs both of the purchaser and the Government in this Court and in the District Court.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. October 27.

RÁMASÁMI AND ANOTHER (DEFENDANTS), APPELLANTS,

and

NÁRASAMMA (PLAINTIFF), RESPONDENT.*

Hindú Law—Inheritance—Stepmother—Sagôtra Sapindas.

According to Hindú law current in the Madras Presidency, a step-mother does not succeed to the estate of her stepson in preference to his grandfather's brother's grandson.

THE plaintiff, widow of Sataluri Nárasimha, sued to recover from the defendants, Rámasámi and his father, Prasannácharlu, the estate of Venkatácharlu, son of Nárasimha, by his first wife deceased, which on his death passed to his widow, and on her death was seized by the defendants.

The defendants pleaded that Rámasámi, the minor son of Prasannacharlu, had been adopted by the widow of Venkatácharlu

* Appeal 95 of 1883.

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under authority given by Venkatácharlu on his death-bed. The defendants further pleaded that they were the nearest sapindas of Venkatácharlu. The District Judge of Vizagapatam (A. Lister) found that Prasannácharlu was not a sapinda, and that the adoption was not proved, and decreed for the plaintiff. The defendants appealed to the High Court.

The Advocate-General (Hon. *P. O'Sullivan*) for appellants.

Hon. *Rámá Ráu* for respondent.

The Court (Turner, C.J., and Muttusámi Ayyar, J.), after confirming the finding of the District Court as to the alleged adoption, found that the grandfather of Prasannácharlu was the brother of the grandfather of Venkatácharlu, and delivered judgment as follows:—

We express no opinion in this case whether a stepmother who had not obtained possession would be entitled to maintain a suit to oust a stranger. All that it is necessary for us to find in this case is that the appellants are sagôtra sapindas, and, as such, are entitled to inherit in priority to stepmother. The appeal is therefore allowed, the decree of the District Court reversed, and the suit dismissed.

Inasmuch as the appellants set up a false case of adoption, we shall direct that each party do bear respectively their and her costs in this suit in both Courts.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884. July 31, November 11.

VENKATÁCHALA (PLAINTIFF), APPELLANT,

and

APPÁTHORAI (FIRST DEFENDANT), RESPONDENT.*

Limitation—Order passed in 1877 *under Civil Procedure Code,* 1859, *s.* 269—*Suit brought after one year—Civil Procedure Code,* 1877, *s.* 335—*Limitation Act,* 1877, *sch. II, arts.* 11—13.

An order having been passed on the 10th August 1877 under section 269 of the Code of Civil Procedure, 1859, cancelling delivery of possession of land brought to

* Second Appeal 61 of 1884.

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sale and purchased by a decree-holder, no suit was brought by the decree-holder to establish his right to the land until 1883.

Held, that the repeal of section 269 of the said Code on 1st October 1877 did not deprive the order of the 10th August 1877 of the effect it possessed when passed, and therefore that the suit was barred by limitation.

Koylash Chunder Paul Chowdhry v. *Preonath Roy Chowdhry* (I.L.R., 4 Cal., 610) and *Gopal Chunder Mitter* v. *Mohesh Chunder Boral* (I.L.R., 9 Cal., 230) distinguished.

THIS was an appeal from the decree of W. F. Grahame, District Judge of North Tanjore, dated 11th December 1883, reversing the decree of A. Kuppusámi Ayyangár, District Múnsif of Tiruvalúr, in Suit 83 of 1883.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court (Turner, C.J., and Hutchins, J.)

The Advocate-General (Hon. *P. O'Sullivan*) and *Bháshyam Ayyangár* for appellant.

The Government Pleader (Mr. *Shephard*) and *Rámáchandra Ráu Saheb* for respondent.

JUDGMENT.—The only question in this second appeal is whether the suit is barred by the law of limitation.

The appellant (R. M. A. R. R. M. Venkatáchala Chetti) brought the suit on 22nd February 1883 to eject the respondent (Appáthorai Pillai). Under a decree which he had obtained in a former suit against the respondent's father, he had brought the property to sale and purchased it himself and been put into possession, but the respondent complained that he had been improperly dispossessed, and on the 10th August 1877 an order was passed under section 269 of the Code of 1859, cancelling the delivery of possession to the appellant and restoring possession to the respondent. The section declares that such an "order shall not be subject to appeal, but the party against whom it is given shall be at liberty to bring a suit to establish his right at any time within one year from the date thereof." The disputes with which the section deals are disputes arising out of obstruction by, or the dispossession of a person other than the judgment-debtor claiming a right to the possession of the property sold under the decree as proprietor, mortgagee, lessee, or under any other title. The object of the section was that the Court executing the decree might decide such disputes summarily and finally, subject only to the reservation

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that the party aggrieved by the order might bring a suit within a year to establish his right. The present suit was not brought until five and a half years after the date of the order, but the appellant contends that it is not barred and that he had twelve years.

The Code of Civil Procedure, 1877, and the Indian Limitation Act of 1877, came into force together on the first day of October 1877. The section substituted in the former for section 269 of the Code of 1859 was section 335. It expressly enacts that the party against whom such an order is passed may institute a suit to establish the right which he claims to the present possession of the property, but subject to the result of such suit, if any, the order shall be conclusive. This however, in our judgment, is merely an express declaration of the effect of the old section 269. The limitation period for such a suit and for other similar suits provided by the Code to contest orders made in execution was removed from the Code to the Limitation Act. Article 11 allows a year to the unsuccessful party to an order passed under sections 280, 281, 282 and 335 of the Code of Civil Procedure (1877), but says nothing about the corresponding sections of the Code of 1859. Article 13 provides that a suit to alter or set aside a decision or order of a Civil Court in any proceeding other than a suit must be brought within a year from the date of the final decision or order by a competent Court. Article 13 merely reproduces article 15 of the former Limitation Act. Article 11 is new and designed to meet the case of the orders specified, which are passed in a suit but not open to appeal.

If article 13 applies, the present suit is clearly barred; but, in our judgment, the order was one passed in a suit and does not fall within article 13. Article 11 does not include orders passed in suits under the old Code, and it is therefore contended that the appellant had twelve years as in an ordinary suit for ejectment. The argument is that section 269 of the old Code has been repealed, and with it the limitation clause which it contains; that now there is no limitation period but the general one of twelve years.

In our opinion this contention cannot be supported. As already stated, the effect of an order properly made under section 269 was that the dispute was conclusively determined as between the parties to the order, subject only to the result of a suit brought within the time prescribed. The repeal of section 269 by the

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amended Code did not deprive the order of the character which attached to it when it was made. It was and continued to be an order which was final unless and until it was set aside in the manner indicated in the section, *i.e.* by a suit brought within a year. No such suit was brought and the order itself has been rightly pleaded as a bar to the present action. There is no doubt that the order was properly made under section 269 in adjudication of the contested right to possession.

Our view is not in conflict with *Koylash Chunder Paul Chowdhry* v. *Preonath Roy Chowdhry*(1), and *Gopal Chunder Mitter* v. *Moresh Chunder Boral*(2). The former case merely decided that a suit for possession, brought after an order passed under section 246 of the old Code, was not a suit to set aside an order in a proceeding other than a suit, falling under article 15 of the Limitation Act of 1871: in that opinion we have already expressed our concurrence. In the latter case a question somewhat analogous to that before us was raised, but the learned Judges refused to consider it as it had not been taken in the Courts below: the only point decided was that article 11 of the Limitation Act of 1877 did not apply to an order passed under the former Codes, and in that opinion also we concur.

This second appeal cannot be supported and is accordingly dismissed with costs.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. November 24.

KRISHNAN (PETITIONER), APPELLANT,

and

NILAKANDAN (DECREE-HOLDER), RESPONDENT.*

Decree—Execution—Limitation—Decree for possession upon payment of mortgage amount and value of improvements—Final decree on ascertaining value of improvements.

In a decree for redemption of a Malabar kánam (mortgage), it was ordered on the 12th December 1879 that the defendants should put the plaintiff in possession

(1) I.L.R., 4 Cal., 610. (2) I.L.R., 9 Cal., 230.

* Appeal against Appellate Order 33 of 1884.

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of the land upon payment by plaintiff to defendant No. 1 of the mortgage amount, and of the value of improvements, to be determined in execution, to such of the defendants as should be found entitled.

On the 12th August 1880 the plaintiff applied for execution, and on the 23rd September 1881 an order was passed that execution should issue on payment into Court by the plaintiff of the mortgage amount and the value of improvements which had then been ascertained.

The plaintiff having failed to deposit the said amount, the application for execution was struck off the file on the 10th November 1881.

On the 8th December 1883 the plaintiff applied again for execution and objection was taken that the application was barred by limitation.

Held, that the application was not barred by limitation.

Dildar Hossein v. *Mujeedunnissa* (I.L.R., 4 Cal., 629) approved.

THIS was an appeal from a decree of E. K. Krishnan, Subordinate Judge of South Malabar, confirming a decree of U. Achutan Náyar, District Múnsif of Betutnád, dated 12th March 1884, rejecting an application made by Krishnan Náyar, defendant No. 8, in Suit 332 of 1878 on the file of the District Múnsif of Patambi, objecting to the execution of the decree.

The judgment of the Múnsif was as follows:—

"Original Suit No. 322 of 1878 was a suit for redemption of a mortgage. The decree of the Court of First Instance was as follows: 'Upon payment of the kánam and purankadam (advance and further advance) amount, Rs. 85-11-5, to defendant No. 1 and the value of improvements, to be determined in execution, to such of the defendants as are then found to be entitled to receive the same, the defendants do, &c.' This decree was affirmed in appeal on the 12th December 1879. The amsham in which the property is situate having been transferred to the jurisdiction of this Court, the decree-holder applied for execution on the 12th August 1880 (Miscellaneous Petition No. 1233 of 1880). On the 13th August he was directed to deposit Rs. 8 as batta for issuing a commission to ascertain the value of improvements. On the 17th November 1880 the commissioner submitted his accounts. On the 8th December 1880 the decree-holder put in his objection (Miscellaneous Petition No. 2184 of 1880) to the commissioner's account. After perusing the commissioner's account and hearing the decree-holder's objection, the Court determined, on the 23rd September 1881, that the value of improvements payable by the decree-holder was Rs. 409-4-11, and on the same date, viz., 23rd September 1881, passed the final order on decree-holder's application, No. 1233 of

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1880, that execution would be issued on his depositing in Court the kánam and purankadam amount given in the decree and the value of improvements Rs. 409-4-11. The decree-holder failed to deposit the amount and his application was struck off on the 10th November 1881. The present application for execution (Miscellaneous Petition 1709 of 1883) was made by the decree-holder on the 8th December 1883. Notice was issued to the defendants, of whom defendant No. 8 contends that the execution is barred, more than three years having elapsed from the date of the former application. I do not agree with him. In my opinion the decree became a complete decree on the date on which the Court determined the value of improvements payable by the decree-holder. Before that, the decree was incapable of execution and the determination of the value of improvements was part of the decree. More than three years from the date of that order, viz., 23rd September 1881, have not elapsed, and the present application is therefore in time. Objection disallowed."

Anantan Náyar for appellant.

Sankara Menon for respondent.

The Court (Turner, C.J., and Muttusámi Ayyar, J.) delivered the following

JUDGMENT:—The decision of the Múnsif and of the Subordinate Judge on the question of limitation is in accordance with the ruling in *Dildar Hossein* v. *Mujeedunnissa*(1), and we are not prepared to dissent from that ruling; but, in awarding mesne profits, the Court executing the decree must be careful to notice that the decree-holder would be entitled only to porapad (rent), and not to the net profits of the estate, until he had paid or brought into Court the sums payable by him as a condition for redemption. With these observations we affirm the order, but direct each party to bear his own costs.

(1) I.L.R., 4 Cal., 629.

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APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

1884. October 6. December 2.

IN THE MATTER OF THE PETITIONS OF PAUL DECRUZ AND JOHN RAYMOND BIBER. *

Penal Code, ss. 190, 503, 508—*Intimidation—Excommunication by Roman Catholic priest—Criminal proceedings stayed until complainant established the illegality of the priest's acts in a Civil Court.*

Where the exercise of ecclesiastical jurisdiction is plainly *ultrâ vires*, or otherwise unsanctioned by the ordinances of a religious society, or where such ordinances controvert the general law, and, in either case, consequences result which the criminal law was intended to restrain, the Criminal Courts are not at liberty to decline jurisdiction.

A Roman Catholic complained to a Magistrate that he had been threatened with an illegal sentence of excommunication and had been excommunicated by the ecclesiastical authorities, with a view to prevent him from asserting his legal rights in defending a civil suit concerning the property of a church :

Held, that, under the circumstances, the proper course was for the Magistrate to postpone the trial till the complainant proved in a civil Court the illegality of the action of the ecclesiastical authorities.

THESE were applications to the High Court under ss. 435 and 439 of the Code of Criminal Procedure to direct the Joint Magistrate of Malabar (H. Ross) to inquire into and try two complaints of similar nature made by Paul deCruz and John Raymond Biber, respectively, against the Very Rev. Fr. Nicholas Pagani, Pro-Vicar Apostolic of North Malabar, and the Rev. Fr. J. M. Monteiro, Vicar of Tellicherry. The complaint of deCruz was as follows:—

"That petitioner is a member of the Roman Catholic Church of Tellicherry and the duly appointed administrator of its affairs. That the appointment of an administrator is, and has hitherto been, vested in the parishioners, and it was by them that petitioner has been appointed as such. That on the 1st day of January last, the Very Rev. Fr. N. Pagani, the Pro-Vicar Apostolic of the Roman Catholic Churches of North Malabar and Canara, convened a meeting in the said church, when a few votes were extorted from

* Criminal Revision Cases 277 and 278 of 1884.

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In re DECRUZ.

a minority of the members then present, and a resolution passed appointing two other persons as administrators in the room of petitioner. That this appointment being irregular, inasmuch as it was made without the knowledge and consent of the majority of the parishioners and without any justifying cause, petitioner, at the special request of the parishioners, refused to hand over the properties in his custody to the newly-appointed administrators. That, in consequence of this just refusal on the part of petitioner to give up the church properties to the said new administrators, the latter filed a civil suit in the District Múnsif's Court at Tellicherry to recover possession of them, which said suit is still pending in the said Court. That knowing that the said suit is pending in a competent Court, and to thwart a just decision being arrived at therein by preventing petitioner from making a proper defence thereto, the said Pro-Vicar Apostolic, by a letter of admonition, dated 7th instant, threatened to, and did, excommunicate petitioner and all those who have aided him in withholding the said properties. That the Roman Catholic Church at Tellicherry, and all properties belonging thereto, being the exclusive property of the parish, the said Pro-Vicar Apostôlic or any one else has no control over the temporal management thereof, and the aforesaid letter of excommunication was issued *malâ fide* and unwarrantedly. That the abovesaid letter of excommunication was, on the 16th March, publicly read in the church by the Rev. Fr. Monteiro, the Vicar, who, in addition thereto, has, as his own act, subsequently excommunicated several others of the parishioners known as, or admitting, helping petitioners in the defence of their legal rights towards meeting the said civil suit. That the said acts of the Very Rev. Fr. Pagani and the Rev. Fr. Monteiro are voluntary and calculated to force petitioner and the greater number of the parishioners out of their way to honestly defend the said civil suit and done with the corrupted and unjust motive of making them entirely powerless to adduce the required evidence therein. That as neither petitioner nor any one of the others who have been, as above, shut out of all spiritual benefits has been guilty of any act warranting this religious degradation from the Pro-Vicar Apostolic and the Vicar respectively, their object in so doing can only be to forcibly compel petitioner and others to give up their legal rights by refraining from justly vindicating them before a competent Court of justice. That the abovenamed Very Rev. Fr. Pagani and

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the Rev. Fr. Monteiro have, and each of them has by respective acts as aforesaid, committed an offence punishable under s. 508 of the Indian Penal Code. Petitioner therefore prays that this Court may be pleased to inquire into the matter and render justice as the circumstances of the case may warrant and as to this Court may seem to be reasonable."

The Joint Magistrate examined deCruz who deposed as follows:—

"I complain against Pro-Vicar Pagani and Father Monteiro for publishing in the church at Tellicherry a letter of excommunication against me, and thereby attempting to cause me not to defend a civil suit now pending in the District Múnsif's Court in which Messrs. D'Rozario and Fernandez have sued me for delivery of certain keys and church property which are in my possession as administrator. The object of the defendants is to make me give up the keys, &c., by inducing me to believe that if I do not do so I will become an object of divine displeasure. The Pro-Vicar's letter of excommunication which I produce (A) * shows that this is their object. I have not given up the keys, &c., and in common with more than 100 others have been refused every rite of the church. The defendants have committed an offence under s. 508 of the Indian Penal Code."

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* We, Nicholas Pagani, S. T. Pro-Vicar Apostolic of North Malabar and Canara, considering the persistent obstinacy of certain persons of the parish of Tellicherry, who utterly disregarding our orders and their own duty, continue to refuse to hand over the keys and other property belonging to the church of Tellicherry, now in their possession, to the newly-appointed administrators of the said church, Messrs. T. T. D'Rozario and A. Fernandez, and considering the grave scandal and disturbance, &c., caused in the parish of Tellicherry by such refusal, we herewith admonish all those who hold keys, property, &c., belonging to the church of Tellicherry to hand them over to the said administrators, T. T. D'Rozario and A. Fernandez, within three days from the publication of this our admonition which we declare to be equivalent to a triple one.

And we declare, and hereby decree in writing, by the authority of Almighty God and the Apostles Peter and Paul and all the Saints, that all such persons who disregard this our admonition after the lapse of three days from its publication *be and remain* ipso facto *excommunicated.*

Moreover, we likewise hereby decree that all others, who by underhand or open machinations, by words, by writing, or by any other active measures, agitate or endeavour to prevent the said administrators, T. T. D'Rozario and A. Fernandez, from taking charge of the keys and other property belonging to the Tellicherry Church *be and remain likewise* ipso facto *excommunicated*, and that absolution from such excommunication be reserved to us or to our successors and to the Roman Pontiff, and that even in the hour of death, they be previously obliged (so far as is possible) to make full reparation for the scandal given, before any priest be empowered to absolve them.

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The Magistrate in dismissing the complaint delivered the following judgment:—

"This is a complaint against (1) the Very Rev. Fr. Pagani, Pro-Vicar Apostolic of North Malabar and Canara; and (2) the Rev. Fr. Monteiro, Vicar of the Roman Catholic Church at Tellicherry, of an offence under s. 508 of the Indian Penal Code. The complainant Paul deCruz was administrator of the Roman Catholic Church and as such had undisputed charge of certain keys and property of the church, until, owing to dissensions in the parish regarding church affairs, a meeting of parishioners was held in January at the instance of the first defendant, and two new administrators, Messrs. D'Rozario and Fernandez, were appointed, the complainant being declared to have been removed from office. Complainant, however, contending that the resolution superseding him was one of a packed meeting and not of the whole body of parishioners or of a majority of them, refused to deliver up the keys, &c., to the new administrators, who have accordingly filed a regular suit in the District Múnsif's Court to obtain possession of the same.

"Complainant states that, on the 7th March, the first defendant, knowing that the civil suit was pending, issued a letter of admonition (A) threatening excommunication of 'all those who hold keys, property, &c., belonging to the church' if they failed to hand over the same to the new administrators within three days from publication of the said admonition; that on the 16th March the publication was made in church by the second defendant, and that he (complainant) having failed to deliver the keys, &c., within three days as admonished, has been excommunicated and refused every rite of the church.

"Complainant alleges that defendants have thus attempted to cause him to give up the keys, &c., which he is not legally bound to do unless the pending civil suit goes against him, and to prevent his defending that suit, which he is legally entitled to do, by attempting to induce him to believe that he will be rendered, by the defendants' act of excommunication, an object of divine displeasure if he does not give up the keys, &c., or cease to defend the suit.

"I am of opinion that this is not a case in which criminal proceedings can lie against the defendants. The power of excom-

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In re DECRUZ.

munication is one which the first defendant holds for the enforcement of discipline in the Roman Catholic Church under him. Complainant, as a member of that church, thereby subjects himself to its discipline; and it is not for a Criminal Court to decide whether the power of excommunication has been rightly or wrongly exercised by the ecclesiastical authorities. In the present case the defendants appear to have excommunicated complainant for contumacy in refusing to obey their orders to deliver up the keys, &c. Whether or not this was a legitimate ground for excommunication (which is practically what complainant wanted me to decide) is not in my opinion a question for this Court: and I accordingly dismiss this complaint under s. 203 of the Code of Criminal Procedure."

Mr. *Wedderburn* for complainant.—The complaint charges an offence under s. 508 of the Penal Code. Complainant alleges that the sentence of excommunication was issued illegally for an improper purpose. For the purpose of this argument the complaint must be taken to be true, and there are grounds for supposing that the charge is not ill-founded; for, to warn a person from defending a civil suit on pain of excommunication is, *primâ facie*, a very improper action from an ordinary point of view.

[Turner, C.J.—There is a late decision in point—*The Queen* v. *Sankara*.(1)] But the decision in that case can be distinguished. Here the priest says if you assert your civil right I will excommunicate you and you will thereby become an object of divine displeasure and remain so till absolved by me. By the act of excommunication the complainant loses his right to absolution and other spiritual and temporal advantages. In the note to s. 508 Mr. Mayne says: "It would be criminal for a clergyman to curse an offender from the altar as used occasionally to be done in Ireland."

(Mr. *Gould*.—That is impossible. No such thing could have happened.)

In *The Queen* v. *Sankara*,(1) the complainant had done an act for which he was excommunicated. Here he is told if he does a legal act he will be excommunicated. If, however, s. 508 is not applicable, and no doubt its meaning is ambiguous, the allegation in the

(1) I.L.R., 6 Mad., 381.

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In re DeCruz.

complaint would sustain a charge under s. 503 or s. 190 of the Penal Code and the Magistrate should not have refused to try the case. If the Magistrate is right in saying that the action of the priest is not examinable by the Court, then a priest might with impunity excommunicate a person for refusing to commit a crime. It has been decided by the Privy Council in *Brown* v. *Curé, &c., DeMontreal* (1) that the Court can decide upon the legality of an ecclesiastical sentence and the same principle is involved in the decision in *Laughton* v. *Bishop of Sodor and Man.*(2)

The question is simply this—Did the priest act maliciously for an improper end? There is a clear threat of injury to character and reputation, made to prevent complainant asserting a legal right to property, which is enough for a charge under s. 503. To defend a civil suit brought to recover church property is also equivalent to making a legal application for protection against injury within the meaning of s. 190.

Mr. *Gould* for defendants.—Mr. deCruz is a member of a voluntary society, and he is bound by the rules of the superiors of the society, and the idea of coming in to claim the protection of a Court, and a Criminal Court above all, is utterly preposterous, when all he has to do is to leave the society. This case does not come under s. 503. It may do him harm, but it does harm legally, and s. 508 is not applicable—*The Queen* v. *Sankara.* (3)

The whole question has been threshed out in *O'Keefe* v. *Macdonald.* (4)

Mr. *Wedderburn* in reply.—Clubs are voluntary societies, and the right of a member to question improper expulsion has been frequently tried [See *Hopkinson* v. *Marquis of Exeter,* (5) *Fisher* v. *Keane,* (6) *Labouchere* v. *Earl of Wharncliffe.* (7)]

The Court (Turner, C.J., and Brandt, J.) delivered the following

JUDGMENT:—We are of opinion that there are no allegations which, if proved, would support a charge of an offence punishable under s. 508, Indian Penal Code. The complainants are warned that, if they persist in a certain course of conduct, they will be excommunicated. A person who is excommunicated does not

(1) L.R. 6. P.C., 159.
(2) L.R. 4. P.C., 495.
(3) I.L.R., 6 Mad. 381.
(4) Ir. Rep. 7 Com. Law, Series 371.
(5) L.R. 5 Eq., 63.
(6) L.R. 11 Ch. D., 353.
(7) L.R. 13 Ch. D., 346.

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become an object of divine displeasure by the act of the priest who pronounces the sentence. The proceeding, as we understand it, purports to be a declaration that the person on whom it is passed has, by his own act (in this case, alleged contumacy to those to whom he owes obedience in matters ecclesiastical) committed sin and rendered himself an object of divine displeasure, and it also purports to be a sentence of interdiction from the means of grace administered by the clergy until on repentance and submission these privileges are restored.

Nor do we consider that the allegations of the complainants, which are capable of proof, would justify a Criminal Court in entertaining a complaint of an offence punishable under s. 190, Indian Penal Code. It is not fairly to be inferred from the communications addressed to the complainants that the accused had in view the probability that they would resort to any criminal or civil tribunal or seek the protection of any authority. It is a more difficult question whether, in reference to the allegations (other than the allegation that the object of the threat was to deter the accused from resorting to the authorities for protection), there is ground for inquiring into a complaint of an offence punishable under s. 503, Indian Penal Code.

We are reluctant to hold that the Criminal Courts can examine the propriety of the exercise by any ecclesiastical authority of jurisdiction which it claims to possess under the ordinances of the society to which it appertains when such authority has been exercised conscientiously; for, the machinery of our Courts of Criminal Justice has not been devised to secure the satisfactory determination of nice questions of ecclesiastical law or civil right, and such questions can ordinarily be more thoroughly sifted when the *lis mota* is between parties rather than between the Crown and an accused. But where the exercise of ecclesiastical jurisdiction is plainly *ultrâ vires* or otherwise unsanctioned by such ordinances, or where such ordinances controvert the general law, and, in either case, consequences result which the criminal law was intended to restrain, the Criminal Courts are not at liberty to decline jurisdiction.

In the case before us the complainants allege that they are threatened with an illegal sentence of excommunication, which will at least injure their reputation unless they abstain from acts which they are legally entitled to do.

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We cannot say that these allegations, if established, might not constitute the offence of criminal intimidation. But to hold that the offence had been committed, it would be necessary for the Courts to inquire (1) whether the acts inhibited by the threat were such as the complainants were legally entitled to do; (2) whether the ecclesiastical authority had or had not jurisdiction to pronounce on their legality; (3) whether or not the same authority had, under the circumstances, jurisdiction to pronounce a sentence of excommunication, and (4) whether if it did not possess that jurisdiction, but had exercised it in good faith and under misapprehension of law, such an exercise of jurisdiction would amount to an offence.

All these inquiries except the last raised nice questions of civil right involving the consideration of the ordinances and practice of a particular ecclesiastical society. We consider a Criminal Court may well postpone the exercise of its jurisdiction till the complainant has proved in a Civil Court the incompetency of the ecclesiastical authority to exercise the powers it has assumed either generally or in the particular case and the legality of the rights they severally assert; and giving effect to this opinion, we shall stay the further consideration of this application for six months to enable the complainants to resort to the Civil Courts if they think fit.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. December 5.

19 Cal. 376.

ALAGU AND OTHERS (PLAINTIFFS), PETITIONERS,

and

ABDOOLA (DEFENDANT), RESPONDENT.*

Civil Procedure Code, s. 43—Cause of action—Splitting a claim—Separate suits for rent due for successive years.

Petitioners filed two suits in a Small Cause Court on the same day to recover rent due for two successive years under the same lease. The sum of the two claims exceeded the pecuniary limit of the Court's jurisdiction. The suit for the rent of the

* Civil Revision Petition 354 of 1884.

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first year was dismissed under s. 43 of the Code of Civil Procedure, on the ground that the claim ought to have been included in the suit for the second year's rent:

Held that, as the petitioners had no intention of abandoning either claim, the proper course was to allow them to withdraw both suits and file a fresh suit in a competent Court.

ALAGU CHETTI and four others filed two suits, Nos. 191 and 192 of 1884, on the same day on the Small Cause side of the District Múnsif's Court of Madura against the defendant, Abdoola Levvai, to recover rent due for fasli 1291 and fasli 1292, respectively.

The rent for both years amounted to more than Rs. 50, the pecuniary limit of the Small Cause Court's jurisdiction. Suit No. 191 was dismissed under s. 43 of the Code of Civil Procedure on the ground that the rent claimed therein should have been included in suit 192. The plaintiffs applied to the High Court under s. 622 of the Code of Civil Procedure to set aside the decree, on the ground that the cause of action in each suit was different and that the claims ought not to be combined in one suit.

Kaliánarámá Ayyar for petitioners.

Rámánújáchároryar for respondent.

The Court (Turner, C.J., and Muttusámi Ayyar, J.) delivered the following

JUDGMENT :—The provisions of s. 43 prevent the maintenance of two suits each for one year's arrear of rent due in respect of the same tenancy: in other words for two breaches of one contract of lease. The principle is explained in *Chockalinga Pillai* v. *Kumara Viruthalum*(1), citing *Grimbly* v. *Aykroyd.*(2)

But, as both suits were filed simultaneously and the plaintiff clearly has no intention to abandon the arrear for either year, we consider he should have been allowed to withdraw both and to file one suit in a competent Court. We set aside the decree that this may be done. Costs to abide and follow the result.

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(1) 4 M.H.C.R., 334. (2) 1 Ex., 479.

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24 mad. 168.
25 Bom. 455.

35 Bom 425
40 Cal 814
19 Cal 1
39 ... 123

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884.
October 15.
December 8.

LAVERGNE AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

HOOPER (DEFENDANT), RESPONDENT.*

Trade-mark—User in foreign market—Abandonment—Estoppel by conduct.

Such possession and use of a trade-mark in one market as to constitute a right in it, establishes in the owner thereof an exclusive right to that trade-mark in other markets, although the owner may not have used it in such markets.

To constitute a mark a trade-mark it must have been adopted as a symbol devised to distinguish a particular class of goods as the goods of that class manufactured or selected by a particular manufacturer or merchant.

Where the plaintiffs by their conduct led the defendant to believe that they claimed no right to a certain trade-mark, and that it was open to the defendant to adopt it as his own, and the defendant did adopt it, and by his industry secured a wide popularity for it in the Indian market:

Held, that the plaintiffs were estopped from denying the defendant's right to use the trade-mark in the Indian market.

THIS was an appeal from the decree of Kernan, J., dated 28th March 1884.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.).

The Advocate-General (Hon. *P. O'Sullivan*) and Mr. *Grant* for appellants.

Mr. *Tarrant* for respondent.

JUDGMENT.—The appellants, trading under the firm of Riviere Gardrat & Company, carry on business at Cognac in France as brandy merchants and exporters. They alleged in their plaint that in 1872 they designed as a trade-mark for their brandies a label bearing a Maltese Cross, and that, on and after January

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* Appeal 10 of 1884.

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1873, they used this label on which were printed the words "Geo. Sage & Company, Fine Cognac Brandy, imported by Robert P. Stanton & Company, Liverpool," for brandies exported by them to the firm of R. P. Stanton & Company at Liverpool; that previous to 1875 they were at liberty to use this label as they pleased, inasmuch as the firm of Robert P. Stanton had ceased to exist, and that in 1875 the respondent's firm selected the appellants' Maltese Cross label or trade-mark for brandies to be purchased from the appellants and to be imported into Madras by the respondent's firm, and they set out certain letters which they claimed proved a contract by which they conceded to the respondent's firm the use of the Maltese Cross as a trade-mark on condition that the respondent's firm sold under that mark brandies procured from them alone, and the respondent's firm engaged to sell no other brandies under that trade-mark than such as were procured from them. They alleged that by mutual agreement the colour of the cross had in certain cases been varied; that the sale of the brandies imported under the trade-mark had been largely advertized and *pushed* by the respondent's firm, and that, as the greater quantity imported had borne a red cross label, it had become known in the market as Red Cross brandy. Lastly, they alleged that the respondent's firm had broken the contract by selling under the trade-mark brandies they had imported from other firms and had thus infringed their trade-mark.

They claimed a declaration of their right to the trade-mark, an injunction restraining the respondent from its use, an account of the profits of sales made by the respondent under the trade-mark of brandies imported from other firms and payment of such profits to them; and they also claimed damages. If the Court held the respondent entitled to use the trade-mark, then the appellants claimed in the alternative 50,000 rupees for breach of the contract made on 9th April 1875, whereby the respondent's firm bound itself to purchase from the appellants and not elsewhere brandies to be sold by them under the trade-mark and name mentioned.

According to the case of the appellants, in and before 1875, the trade-mark of a Maltese Cross in red or other colour had been adopted by them to distinguish brandies prepared by them for the market, and they had a property in it and the sole right to use it

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in any market. The deceased partner of the respondent when on a visit to Cognac had inspected the labels and trade-marks used by the firm, and in 1875 he selected the trade-mark of a Maltese Cross in red or other colour to be used in the sale of brandies purchased by him from the appellants and imported by him for the Indian market. The appellants consented to the exclusive use of the trade-mark by the respondent's firm in the Indian market on the terms that the brandies to be imported and sold under the trade-mark should be brandies purchased only from them.

According to the respondent's case, the appellants had no property in a trade-mark of a Maltese Cross at the time it was first introduced into the Indian market. Mr. Coleman, who was the agent for a firm which imported beer under that trade-mark, adopted the trade-mark, closely resembling but not identical with one which had been used in the English market but abandoned by the appellants, for a class of brandies sold by him, and his right to the exclusive use of it in the Indian market was recognized by the appellants, and he did not contract with the appellants to sell no brandies in this market under the trade-mark mentioned except such as he purchased from the appellants.

The learned Judge who tried the suit on the Original Side of this Court thought the appellants had a right of user of the trade-mark in France, but that they had no right of user in India; that if they had any title to the trade-mark in India which they could transfer, they had estopped themselves from insisting on it by assenting to its adoption by the respondent's firm; that the respondent's firm had acquired a right to the use of the trade-mark in India, and that it had not bound itself to sell brandies under the trade-mark other than those purchased from the appellants.

On appeal it is argued that, if the appellants established their right to the trade-mark in France and in England, they possessed a property in it in India; that the appellants had not transferred that property to the respondent's firm, and that there was no consideration for such transfer, and that the assent of the appellants to the use of the trade-mark by the respondent's firm in India was conditional on a contract to purchase from the appellants all brandies sold by the respondent's firm under the trade-mark.

The first and second issues had been framed as follows:—1st, whether the Maltese Cross mark in red, green, or blue is the

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plaintiffs' trade-mark; 2nd, whether the symbol of red Maltese Cross and name of Red Cross brandy are the trade-mark and trade-name belonging to the plaintiffs. On these issues the learned Judge recorded findings in the negative, although in his judgment he had expressed the opinion that the appellants had a right of user in France, and the appellants, in reference to the opinion expressed by the learned Judge, have, in their grounds of appeal, claimed that findings should have been entered in their favour on these issues.

The learned Counsel for the respondent contends that, if the appellants *now* have any right to the trade-mark in the French or English market, which he is not prepared to admit, they had no such right in any market at the time the respondent's firm adopted it, and that though a somewhat similar label had at one time been used by one of the appellant's customers, its use had been abandoned when the respondent's firm commenced to use a Maltese Cross as their trade-mark as importers.

We consider that as the finding on the first and second issues was in the respondent's favour, although no objection has been filed, the learned Cunsel for the respondent is entitled to contend that the evidence fails to show a right in the appellants to the trade-mark in France at the time the contract was made. We therefore treat the case as one in which all the questions of law and fact which were raised in the Court of first instance are open for decision on apppeal.

We propose in the first place to consider the question of law whether such a possession and use of a trade-mark in one market as to constitute a right in it establishes in the proprietor an exclusive right to that trade-mark in any other market, though he may not have employed it in such other market.

That the right to a trade-mark will be recognized in this country we have authority in a case in which the respondent's firm prevented the infringement of the trade-mark now in suit by a rival English firm. The same considerations of policy which prior to the regulation of trade-marks by statute induced the English Courts to protect them and to recognize in a manufacturer or selector a right under certain limitations to the distinguishing mark or title under which he offered his goods to the public and to mulct in damages any other person who intentionally infringed a

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trade-mark so adopted, have induced the Courts in this country to accept as consonant with equity and justice the general rules which obtain in commercial countries respecting trade-marks. Of course the Courts in British India would only recognize the particular provisions of the statute law of other countries in so far as may be necessary for the determination of rights which have been acquired under such provisions, unless indeed by the law of England or British India they are directed to do so. The object of the law in recognizing a right to trade-marks is to protect the public from fraud, to secure to a purchaser reasonable certainty that he is purchasing an article which has a certain reputation in the market, and to secure to a manufacturer or selector the reward of his skill and care, the benefit of the custom which he deserves, and which is intended for him, and although where a stranger infringes a trade-mark unintentionally, he is not liable to damages, he will be restrained from the further use of it—*Millington* v. *Fox*.(1) The remedies which are conceded for the protection of trade-marks adopted in the home market are also extended to trade-marks which have been originally adopted in foreign markets, and it is immaterial that goods bearing such marks are not sold in the home market, *Collin's Company* v. *Walker*,(2) *Collin's Company* v. *Brown*,(3) *Collin's Company* v. *Cower*.(4) It must not be assumed that every ornament which may be applied to the case or flask or wrapper in which goods are exposed for sale are necessarily trade-marks. Such ornaments are often employed as mere devices to arrest attention and are not intended to convey any other meaning. To constitute them trade-marks they must have been adopted as symbols devised to distinguish a particular class of goods as the goods of that class manufactured or selected by a particular manufacturer or merchant, and it is possibly open to argument whether the appellants on their own statement had acquired in 1875 a right to a red Maltese Cross as a trade-mark except in combination with the words which purported that the goods had been exported by a particular firm and selected by a particular firm. In the view we take of the case, it is unnecessary for us to determine this point.

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(1) 3, My. & Cr., 338.
(2) 7, W.R., 222.
(3) 3, K & J., 423.
(4) 2, K & J., 428.

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40 cal 314
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Again, as the right to a trade-mark may be acquired, so it may be abandoned. As there is no length of time required for the acquiring of a right to a trade-mark: in like manner apart from statutory law there is no length of time required to constitute an abandonment; and it must, in each case where abandonment is asserted, be a question to be determined from the circumstances whether the right has or has not been abandoned.

A right to use a trade-mark may be created by license or assignment, and the owner may be, in respect of a trade-mark as in respect of any right, estopped by his conduct from denying the title of another person. In the case before us, if the appellants establish that, before the date of the alleged contract in 1875, they had acquired a right to the use of the Maltese Cross as a trade-mark, and that they had not abandoned that right, the possession of the right would have been a good consideration for the alleged promise by the respondent's firm to purchase brandies sold under that mark only from the appellants. And if it were shown that independently of any contract they had conceded the use of the mark to the respondent's firm only for a purpose which has failed, the limitation in the right of user being such as might reasonably be inferred, they would be entitled to relief from the Court. On the other hand, it might be shown that they had never adopted the Maltese Cross as a trade-mark, or that they had abandoned its use or that if they retained a right to it at the date of the alleged contract, they had induced the respondent's firm to believe that they claimed no such right, and that it was open to the respondent's firm to adopt the mark as its own, and if, as is admitted in the plaint, the respondent's firm by largely advertizing and pushing the sale secured a wide popularity for the mark, the respondent's firm is entitled to enjoy the benefit of its expenditure and exertions, and the appellants would be estopped from denying the title of the respondent to the use of the mark at least in this market.

With these observations, we proceed to consider the evidence.

M. J. A. A. Gardrat deposed that the firm of which he is a member is in the habit of exporting brandies prepared by them under a large number of marks. Of these marks, six are employed for so many qualities of brandy regularly supplied by the firm. There are also other marks which the firm appears to claim as its own property which are used for brandies prepared according to

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special order, and there is a third class of marks which are used by it for brandies specially prepared and which it regards as the property of the persons who give the orders.

In December 1872 M. Riviere, a late partner who was then in England seeking orders, sent to the head office of the firm an order to supply brandy to Messrs. R. P. Stanton & Co. of Liverpool under a Red Cross mark. The design differs from that which is the subject of this suit only in this that the sides of the arms of the cross are concave, while the sides of the arms of the cross claimed by the respondent are straight. Brandy was supplied under this mark to the firm of R. P. Stanton & Co., and the label bore the name of R. P. Stanton & Co. as importers, George Sage & Co. as exporters. M. Gardrat has deposed that inferior brandies are sent out by the firm under fancy names.

The firm of R. P. Stanton became bankrupt in August 1873, and it does not appear that it re-opened its business or that any brandies were supplied to it by the appellants after that date. It is admitted in the plaint that it ceased to exist. There is some evidence, but in our judgment of too vague a nature to be safely accepted, that brandies were also supplied by the appellants under the same label to Messrs. Oakes, Cunliffe, Manchester, J. Dreyfus, London, and Greenlees of Liverpool. M. Gardrat deposed to this, but could give no particulars of dates. M. Lavergne who was not examined for two months after his partner and had had an opportunity in the meantime to refresh his memory from the books of the firm could only state his belief that brandies had been supplied under the label between 1873 and 1876. It is noticeable that no allegation is made in the somewhat prolix plaint that brandies were supplied under the Red Cross label to any other firm than R. P. Stanton & Co.

Probably in May 1873, and certainly not later than August 1873, Mr. Coleman, the then sole proprietor of the respondent's firm, visited Cognac. He had been previously doing business with the appellant's firm, but he desired to make arrangements for a supply of brandy under his own label. According to the recollection of the appellants, which, having regard to the purpose of his visit, we believe, is more accurate in this respect than Mr. Coleman's, he was shown one of several books of labels under which brandies are supplied by the firm. This book contained

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labels of all the three classes which have been mentioned, that is to say, not only those which were used by the firm as the trade-marks of their regular qualities, or which the firm used for special qualities while claiming the label as their trade-mark, but at least eighteen others to which the firm makes no claim.

It is desirable to refer to the language of the witnesses as to what occurred on this occasion.

M. Gardrat has deposed on his examination-in-chief as follows:—

"He asked us to give him an idea about a trade-mark to be used for these brandies. We showed him our book of labels, and when he came to the Maltese Cross he chose that label 'The Maltese Cross.' We told him we might use this trade-mark or label for our shipment to Madras."

And on cross-examination.

"When Mr. Coleman came to that label No. 20." (The labels not claimed by the appellants, it may be observed, are Nos. 21, 22, 23, 24, 25, 26Bis, 31, 32, 34, 36, 37, 38, 39, 41, 42, 44 and 45. No. 20 was consequently the first of a long series which were not, with a few exceptions, claimed by the appellants). "He selected that label; he selected the trade-mark with 'Geo. Sage.' He said he would let us know the full particulars when he got to Madras. When he came to the label, he was struck with the appearance of it, and said "that will suit me." He said we might use it for him. The reason we gave him why we could use it for him was "because we were not using it for other persons, or rather the firm for whom we had that label made had ceased to exist." And then in answer to the somewhat suggestive question "Was there anything said at that interview about his getting all his brandy with this mark exclusively from us," the witness replied, "There had been no contract made then; the only thing that was said was we will give you the exclusive use of that label for Madras."

M. Lavergne's evidence is as follows: "Mr. Coleman distinctly said that he wanted a special mark, and we showed him a book of labels. This is the book G1 that was shown him by me or my partners. When the book was handed to Mr. Coleman, he said that the label marked G2 pleased him. Before saying he was pleased with the label, he looked through the book. Nothing

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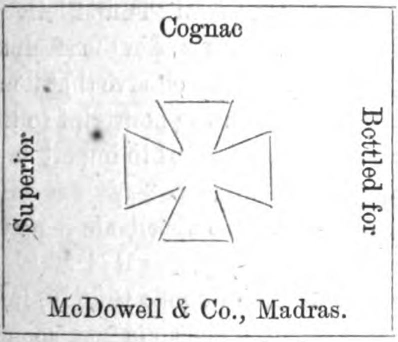
further was said on this occasion about supplying brandy under this mark," and on cross-examination "Mr. Coleman thought of no other label than G2. Nothing was said as to the right of my firm to that label."

Mr. Coleman, who was unfortunately labouring at the time of his examination under an illness of which he subsequently died, denied that he was shown any book and gave as his reason that he had made up his mind to have his own mark. He deposed that he selected the mark, a red Maltese Cross, from the label of Messrs. Salt & Co., brewers, and with whose trade-mark the label selected by him corresponds in every particular.

It will be noticed that the conversation at Cognac could not have occurred later than August 1873.

It was not until March 1875 that Mr. Coleman gave the order for the shipment of brandies under the Maltese Cross label, and the contents of his letter confirm his statement as to his impression that he had borrowed the device from Messrs. Salt & Co., rather than that it had been suggested to him by any label he had seen at Cognac. He makes no reference to any label selected by him which he would in all probability have done if he had remembered the circumstances. On the contrary he enclosed a sketch of the label he required. He wrote as follows:—

"I will be glad if you can put up two hogsheads of your cheapest brandy; reduce it to 26 under proof according to Syke's hydrometer; and bottle and ship on our account."



"The case should be branded on the outside like the label. If you help me with this, I promise to ask you to send me large shipments."

On the 9th April 1875 the appellants replied:—

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"With regard to your order for the two hogsheads brandy to be bottled for your account, we have done our best to understand your idea and carry it out. In order to save time we are going to ship you as soon as possible *via* London

"25 dozens pale brandy with your label at 13S. F.O.B. Charin Co.

"25 do. do. do. do. do. at 15S. do.

"And we have already ordered dies for this label and also brands for the cases.

* * * * *

"P.S.—It is also understood that this brand, the Maltese Cross, is your property, and that we shall not be allowed to use it for any one else, unless it is in obedience with your instructions, and in return it is to be understood that you will import it exclusively through us."

On the 30th April 1875 the respondent's firm wrote to the appellants, and, after informing them that a sample bottle of brandy had been sent to them, observed, "The design of the label we forwarded to you a mail or so ago is intended to appear on bottles of brandy equal in quality to the sample above referred," and on the 7th May 1875, "We trust that our letter of the 12th March recommending you to ship brandies under a label bearing a Maltese Cross per pattern thereto attached has reached you, and that you have given the same your usual kind attention," and on the 21st May 1875, "We note with thanks that you are preparing shipments of 50 cases of brandy bearing labels and capsules with the trade-mark we gave you." This appears to have been the first letter addressed by the respondent's firm to the appellants after the receipt of the appellants' letter of 9th April 1875, and we observe that it makes no reference to the suggestion contained in the postscript to that letter that the respondent's firm should bind itself to import brandies under the label from the appellants only.

On the 28th April 1875 the appellants registered at Cognac as a trade-mark the label G2, *i.e.*, the Red Maltese Cross with the words Geo. Sage & Co., Fine Cognac Brandy, imported by Robert Stanton & Co., Liverpool. They did not communicate this circumstance to the respondent's firm. In September 1879 they took steps to register in England the Maltese Cross as their trade-mark and then described themselves as having used it for four years and a-half.

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There is no evidence to show whether the label bearing a Maltese Cross with the name of Geo. Sage was originally designed by Messrs. R. P. Stanton or by M. Riviere. Seeing that the name entered on the label as that of the exporter was a fancy name, while that of the importer was the true style of the firm, it appears to us to be a fair inference that the mark was intended to be the special trade-mark of the importer and not of the exporter. On this evidence we consider that the appellants have failed to prove that they had adopted the Maltese Cross as one of their trade-marks either in 1873 or up to 9th April 1875; that Mr. Coleman was shown the Maltese mark by the appellants as a trade-mark which it was open to him to make his own in 1873; that possibly from an unconscious memory of the label he then saw but in the belief that the mark was suggested to him by the label of Messrs. Salt & Co., Mr. Coleman adopted the Maltese Cross as his trade-mark in 1875.

Assuming, however, that the appellants had adopted the Maltese Cross as a trade-mark in 1873 or at any other time before 9th April 1875, we think it is to be inferred from the statement made to Mr. Coleman that they had abandoned it, and if they had not abandoned it then we hold that their conduct estops them from denying the right of the respondent's firm to adopt it.

According to the evidence of both parties, Mr. Coleman went to Cognac to arrange for a mark of his own, and according to the evidence of the appellants the Maltese Cross was shown to him in a book containing marks to which they made no claim and was the first of the series of such marks. It was represented to him as a mark which might be used for his exports and as a mark which had been abandoned by the firm for which it had been designed, nor according to M. Lavergne's evidence was any claim then made to the mark by the appellants.

When, without any reference to the circumstance that a label not materially at variance with that ordered by him had been shown him by the appellants, he invited their assistance to procure such a label, they made no claim to it in terms which could reasonably have been interpreted as denying his right to assume it as his own. They in terms admitted it to be his property; and a reasonable sense may be given to the postscript by interpreting it as referring it to the assistance they were to render in procuring

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the label and brands or to the promise to respect his property in it. It is to be noticed that on the 20th April 1875 the appellants for the first time registered the Maltese Cross in Cognac as a trade-mark and they then registered a label with the name of Geo. Sage as exporter and Robert Stanton & Co. as importer. It is explained that they had not up to that time exported brandy under the label suggested by Mr. Coleman, but they now claim the Red Cross as their mark independently of the words which purport to be the names of the exporter and importer, and if the French Law (on which we have no information) requires that a trade-mark should be registered only in the form in which it was actually used, there was apparently no reason why the appellants should not have awaited the despatch of a shipment to the respondent's firm, unless it was that they desired to force Mr. Coleman to deal only with them if at any time he desired to take his custom elsewhere. The appellants did not inform Mr. Coleman that they had registered the mark as their own, nor did they inform him in the postscript of 9th August that they intended to do so. Had they done so, it might fairly have been argued that the information would have put Mr. Coleman on inquiry on whose behalf the registration had been made and he might have gathered from the reply that it was the intention of the appellants that he should enter into the contract which is now alleged. But no such information was given and the contract was not made; for we are persuaded that the respondent's firm did not understand that its property in the trade-mark it had selected was conditional on its accepting such a contract.

Bearing in mind that the respondent's firm believed that the trade-mark had been suggested by it, the subsequent correspondence could not but have confirmed that belief.

In the letter of 9th April, the appellants writing to the respondent's firm described the label as "your label" and the brand as "your property."

In their letter of 2nd June 1875 they charged the respondents £4-12 for the branding irons: and when they subsequently waived this charge, they did so as a matter of favour.

In a letter written by the respondent's firm on 21st September 1875, they wrote to the appellants "We much wish that the brandy you put up in bottles bearing our Red Cross trade-mark should be

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of that quality," and they observed "our trade-marks will fall into disfavour." On 3rd December 1875 the appellants acknowledged this letter without repudiating the claim to the mark or suggesting that they themselves would be common sufferers.

On the same date the appellants wrote another letter in which they distinguish between "consignments of our own brand" and shipments of brand McDowell.

In a letter of 31st December 1875 the respondent's firm spoke of "our Red + Brandy," and in a letter of 5th February 1870 wrote in reference to a shipment of better quality "use a green label with gold edge and our Maltese Cross in red and gold in the centre."

On 26th October 1876 the appellants wrote to the respondent's firm about a shipment of "your Red Cross Brandy." Again on 13th June 1877 the respondent complained that the inferiority of the brandy supplied would "damage the reputation of our brand and trade-mark." Again the claim was not repudiated by the appellants in their reply of 20th July 1877. On the contrary, in a letter of 18th July 1877, written in answer to a private letter of Mr. Coleman, Mr. Coleman was told that he need be under no apprehension for the appearance of the printer's name on his label, and, in reference to the complaint that the brand supplied was inferior, that he was at liberty to take his orders elsewhere; while it was not stated that by so doing he would forfeit his right to the trade-mark.

In 1879 Messrs. Cutler & Palmer introduced brandies with the Maltese Cross label and the respondent's firm contemplated proceedings. Mr. Coleman was in London and apparently had inquired at the London office of the appellants if his mark had been registered. The agent of the appellants replied on 24th April 1879 "no doubt the registration of your brands has been effected, but to make sure we have reminded our firm at Cognac to see to it." On 29th April 1879 the label used by the respondent's firm was registered by the appellants at the respondent's instance at Cognac. On the 14th May 1879 the appellants wrote to the respondent's firm. 'These flasks * * have goblets and will doubtless tend to increase the sale of your mark.'

On 18th June 1879 the respondent's firm wrote to the appellants "please let us know if our label has been registered both in Bordeaux and London, if not do so at once."

On 19th June 1879 the appellants wrote to the respondent

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"all the labels used for you will be registered and sent to no one else, and on the 15th July 1879, "Red Cross, McDowell & Co., "our letter 19th June replies to your inquiry concerning registration. It was fully attended to and completed on the 29th June last in Cognac not in Bordeaux. Cognac is the place where Cognac brands are registered. Your labels have not been registered in London. We do not even have our own labels registered there. Nevertheless, in obedience to your instructions, we have sent a set of labels to London by this mail and they will be registered on Wednesday next, 16th instant" * * *. In this letter the appellants for the first time clearly intimated that they claimed to have at one time a property in the Red Cross trade-mark.

They wrote :—

"Red Cross. When in 1875 your Mr. Coleman selected in our book the Maltese Cross for his brandies we had already registered the Red Cross ourselves several years before; therefore should Messrs. Cutler Palmer & Co. or Bisquit Dubouchi have registered it in London even anterior to the 29th April, date of your registration here, still we have no doubt our primacy in the registration of the original Red Cross would, if found necessary, give us the power to interfere and protect our mutual interest. In the meantime we trust your Madras Magistrates will soon grant you justice. This could be done in France at once. Your case being extremely simple, some years ago you start a certain brand quite distinct of any other which ever before had been imported in Madras; so long as it remains a venture no one interferes, but the moment it becomes a success an opponent comes coolly forward and reaps the benefit of your industry, risks, &c. Fortunately times have gone by when such burglaries were permitted."

This statement that the Red Cross had been registered as a trade-mark by the appellants before the conversation with Mr. Coleman, was inaccurate, and the appellants have in this letter and in their plaint ascribed to the conversation with Mr. Coleman a date nearly two years later than the true date. The allegation that the mark had been selected from the appellants' books was repudiated immediately. On the 13th August 1879, the respondent's firm wrote: "you are under a mistake in your statement that the Red Cross mark was selected from your books. If you refer to a letter to your M. Riviere from Mr. Coleman, dated 12th March 1875, you will find the label designat-

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In their letter of the 15th July 1879 the appellants, though they asserted the mark was selected from their books, and suggested that it could be protected for the mutual benefit of the two firms, distinguished between the respondent's trade-mark and the trade-mark they had registered as their own, and it was not necessary for them to have registered the mark as the respondent's mark in 1879, if they were conscious it was their own and had already been duly registered in 1875, though it may have been prudent to register it if there was any doubt as to their own title. However this may be, they did not at once repudiate the claim of the respondent's firm to the re-invention of the trade-mark. The explanation offered is that they were then on friendly terms with the respondent's firm. Apparently, the more reasonable explanation is that that they did not then care to assert a right to the mark as their own. On 29th September 1880 the appellants informed the respondent's firm that they had received from Bordeaux a flask with a removable tin goblet on which was painted in red the Maltese Cross and the name McDowell & Co., and they inquired if the respondent's firm had any knowledge of such a flask, or if it could be that such flasks were being imported into India by some other firm without their order. Exhibit G 35. On the 28th October 1880 the respondent's firm replied as follows:—"Regarding the flask of Red Cross Brandy which you mention, this was put up at our request by a firm at home as we found it impossible to sell the brandy here at the price you charge us."

M. Gardrat admitted that the letter gave him information that the respondent's firm was selling brandy under the Red Cross mark which had been "put up for them by another firm at home," but he added that he did not understand the expression. He must nevertheless have suspected that brandy was being sold under the Red Cross mark by the respondent's firm which had not been sold by his firm, but he neither protested nor took any steps to prevent the use of the mark by the respondent's firm until 9th August 1882, when this suit was filed. And what are the circumstances under which it has been filed? Messrs. Cutler & Palmer, who were defeated in their attempt to pirate the mark which the respondent's firm has admittedly at considerable expense established as a well known trade-mark in this market, induced the appellants to bring this suit undertaking to pay part of the costs of the proceedings and to obtain their supplies of Red Cross

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Brandy from the appellants. These circumstances, although they do not of course deprive the appellants of their right to relief if they establish it, nevertheless suggest that the appellants were conscious of the weakness of their claim and were not themselves prepared to incur the expense of asserting it. However this may be, having regard to their whole conduct and the accounts given by them of the conversation with Mr. Coleman respecting the selection of a trade-mark, we are satisfied that the respondent's firm was induced to believe that the trade-mark they selected was to become the property of the firm, and that in that belief they expended money and labour in establishing it. Consequently, we hold the appellants estopped from denying the right of the respondent to use it at least in the Madras market. On these grounds, we affirm the decree of the learned Judge and dismiss the appeal with costs.

Solicitors for appellants *Grant* & *Laing*.

Solicitors for respondent *Barclay* & *Morgan*.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1883. July 31. 1884. November 17.

KRISHNA (PLAINTIFF), APPELLANT,

and

VENKATASÁMI (DEFENDANT), RESPONDENT.*

28 Mad. 337. 42 Mad.

Rent Recovery Act, s. 11—*Implied contract.*

Where a landlord having, for many years, accepted rent at "dry" rates from a tenant for certain land, sued the tenant to enforce acceptance of a pattá at "garden" rates on the ground that the tenant had raised a crop with water taken from a well constructed by the tenant:

Held, that there was an implied contract within the meaning of s. 11 of the Rent Recovery Act to accept rent at "dry" rates and that plaintiff was, therefore, not entitled to enhance the rate of rent, the improvement having been affected at the expense of the tenant.

THE plaintiff, Krishna Ráu, sued the defendant, Venkatasámi Náyak; under the provisions of the Rent Recovery Act (Madras Act VIII of 1865) to enforce acceptance of a pattá.

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* Second appeal 99 of 1883.

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The defendant pleaded that he was not bound to accept a pattá, as the rent for part of the land was charged at "garden" rates, 21 fanams per kottai, instead of 15 fanams, the "dry" rate, as before.

The plaintiff replied that the higher rate was charged because a "garden" crop had been raised by means of well water.

To this the defendant rejoined that "dry" rate had always been paid, and that the plaintiff had no right to enhance it, and that the well was not situated on plaintiff's land..

The Sub-Collector of Tinnevelly (E. Turner) held that, as defendant had paid "dry" rates for many years, a contract existed to pay such rates, and decreed that defendant should execute a muchalká at such rates.

On appeal, the District Judge of Tinnevelly (J. C. Hughesdon) confirmed this decision.

Plaintiff appealed to the High Court on the ground that the fact that "dry" rates had been levied for some years did not amount to a contract that "garden" rates could not be levied for all time.

The Advocate-General (Hon. *P. O'Sullivan*) and *Rámáchandra Ráu Saheb* for appellant.

P. B. Gordon for respondent.

The Court (Turner, C.J., and Muttusámi Ayyar, J.) delivered the following

JUDGMENT:—The evidence shows no more than that respondent has held the lands at dry land rates, which is consistent with a tenure from year to year and does not prove a contract that the same rates shall be maintained in perpetuity. The rate then must be determined according to the rules laid down in s. 11, para. 3, Act VIII of 1865. We remit to the Lower Appellate Court for determination the issue, what is a fair rate of rent calculated under the rules mentioned.

[In compliance with this order, the District Judge returned a finding that, as defendant had dug the well, plaintiff was not entitled to enhance the rate above 15 fanams, but that, if plaintiff was entitled to enhance the rate, the rate was 43 fanams.

Upon the return of the above finding, the Court delivered the following

JUDGMENT:]—In second appeal 11 of 1878, under circumstances which are said to be similar to those of the present case, the Head Assistant Collector had refused to allow the zamíndár anything in

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excess of the original dry land rate. The District Court upheld the decision on the ground that it had invariably refused enhancement in such cases. The decisions of the Courts below were upheld by this Court by the Chief Justice, Sir Walter Morgan, and Mr. Justice Innes; but we have not the benefit of the reasons which governed the decision, as no judgment was written. On the other hand in second appeals 160 and 161 of 1870 it was held by Innes and Kindersley, JJ., that a landlord might claim an enhancement not exceeding the amount entered at the permanent settlement as the faisal rates of dry land.

It is found in this case that the tenant has paid for a series of years and up to the year in dispute only púnja rates on the land, in respect of which he resists the imposition of a "garden" rate. Since our former order was passed, the Full Bench has held in *Venkatagopal* v. *Rangappa*(1) that payment of rent at a certain rate for a series of years is evidence of what the Act terms an implied contract, and on this ground it has been ruled in favour of the landlord that he was entitled to claim rates higher than the faisal rate.

The same construction must be adopted in favour of a tenant, and therefore in the case before us it must be held that there was an implied contract to pay rent at the púnja rates. Is then the zamíndár entitled to enhance the rent by reason that the land has been improved at the tenant's expense and is now cultivable and has been cultivated as a garden crop? It was the policy of the Act to allow the enhancement of rates so settled only under the circumstances expressly mentioned in the Act, namely, when the land has been improved by the landlord, or at the expense of Government with a consequent increase of the demand for revenue on the landlord. The Act contains no provision for enhancement when the improvement is effected at the expense of the tenant.

On these grounds, we affirm the decree of the Courts below and dismiss the appeal with costs.

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(1) I.L.R., 7, Mad., 365.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

NÁRASIMULU (DEFENDANT No. 2), APPELLANT,

and

SOMANNA (PLAINTIFF), RESPONDENT.*

1883. January 19. 1884. November 17.

13 Mad. 324. 11 do. 148.

***Registration Act*, 1877, ss. 49, 50**—*Notice—Fraud—Optionally registrable sale deed, unregistered, competing with similar deed registered.*

R sold land to S in 1878 for Rs. 54 and put S in possession. In 1879 R sold the same land to N for Rs. 24-8-0. N registered his sale deed. The sale deed of S was not registered. In 1879 S sued N to have N's sale deed cancelled on the ground of fraud. The Lower Courts held that N's sale deed was executed collusively and fraudulently and decreed the claim:

Held, on second appeal, that as there were grounds, apart from notice and knowledge of possession, for holding N's sale deed to have been executed collusively, the decision was correct.

THIS was an appeal from the decree of E. C. Johnson, District Judge of Godávari, dated 29th November 1881, confirming the decree of V. Srínivása Ráu, District Múnsif of Ellore, in suit 150 of 1879.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.)

Subba Ráu for appellant.

Rámáchandra Ráu Saheb for respondent.

JUDGMENT.—Korlipara Somanna, the respondent in this appeal, purchased a piece of ground from one Morturi Ramanna for Rs. 54 on the 5th July 1878 and has since been in possession. But the sale deed, Ex. A, executed in his favor was not registered under Act III of 1877. Subsequently the vendor colluded with the appellant (Korlipara Nárasimulu) and executed the sale deed, Ex. I, for the same land in his favor for Rs. 24-8 on the 14th January 1879, and this document was registered, though like Ex. A the document was only a subject of optional registration. Thereupon,

* Second Appeal 382 of 1882.

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the respondent sued to cancel the sale deed, Ex. I, and alleged that it was collusive and fraudulent, and the Courts below considered his allegation proved and decreed the claim.

The Registration Acts for this country divide instruments which fall within their purview into two classes, of which the one is effectual to create title only after registration, while the other, though effectual to create title, is liable to be defeated by a registered instrument subsequently executed.

Looking to the whole course of British Indian legislation on the subject of registration, this Court has held that an instrument of which registration is not compulsory is not rendered indefeasible because notice of it is obtained by the person claiming under a subsequent instrument; and that mere notice will not deprive a person claiming under a subsequent instrument of the priority which the Registration Acts confer on a registered instrument in competition with an unregistered one, *Nallappa* v. *Ibram*(1). That this is so in the case of instruments of which the registration is compulsory, has been held in 1869 by the Court of Chancery in England [in a case which arose in this Presidency]—*per* Lord Hatherley—*Hicks* v. *Powell*.(2) But although where the prior instrument is optionally registrable, mere notice may not deprive a person claiming under an instrument subsequently executed and registered of the priority given him by the Act, inasmuch as the prior instrument was effectual to create a title, we are at liberty to hold that a participation in fraud by the person claiming under the second instrument will deprive him of the benefit of the provision which was aimed at the prevention of fraud. Were it not for that provision which was intended at once to encourage registration and to protect innocent parties, the assignee would receive no higher title than his assignor could convey and, *ex hypothesi*, the assignor had no title. Though it is to be inferred from the provision respecting oral agreements accompanied with possession that knowledge of possession like mere notice is not of itself sufficient to defeat the priority conferred on a registered instrument, such knowledge or notice may of course also be taken into consideration with other circumstances as indicating that the subsequent transaction is fraudulent.

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(1) I.L.R., 5 Mad., 75. (2) L.R., 4 Ch. App. 741.

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In the case now before us the prior instrument was optionally registrable and therefore conferred a complete title which was followed by possession: the subsequent instrument, it is found, was executed collusively and there are other grounds besides notice and knowledge of possession for holding it to be fraudulent. To allow it to prevail would be to defeat the object of the Registration Act. The appeal fails and is dismissed with costs.

NÁRASIMULU v. SOMANNA.

ORIGINAL CIVIL.

Before Mr. Justice Kernan.

SÍNAMMÁL

and

THE ADMINISTRATOR-GENERAL OF MADRAS AND OTHERS.*

1883. April 26, 27. 1885. February 2.

9 Mad. 466.

Hindú law—Marriage—Divorce—Change of religion—Degradation—Death of husband while outcast—Dissolution of marriage—Suit by widow to recover husband's estate.

In 1850 K. married S. both being Bráhmans. K subsequently became a convert to Christianity.

In 1881 K died and S claimed his estate.

Held that, according to Hindú law, K died an outcast and degraded, and that, as his degradation was unatoned for, the marriage became absolutely dissolved, and no right of inheritance remained to S.

THIS was a suit brought *in formâ pauperis* by one Sínammál, who described herself as a Bráhman widow, against (1) the Administrator-General of Madras, and, as such, administrator to the estate of Arthur Kristnama deceased; (2) Mangalam, otherwise called Mrs. Kristnama; and (3) Chittúr Anandáchári.

The plaintiff alleged in her petition, dated 14th November 1882, that thirty years ago, when she was eight years old, she was married to Kristnama, who was then a Bráhman; that shortly after the marriage Kristnama became a convert to Christianity; that by such conversion Kristnama lost his caste and plaintiff consequently did not cohabit with him; that Kristnama, after his conversion, held various appointments under Government and died in 1882, being then Deputy Collector at Tanjore, leaving property worth Rs. 40,000, which was in the possession of defendant No. 1;

* Civil Suit 16 of 1883.

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that Kristnama, after his conversion, divided from his father and brothers, and that the property left by him was acquired without aid from ancestral funds; that Kristnama, at various times after his conversion, paid to plaintiff various sums for her support and interchanged visits with her; that defendant No. 2 represented herself to be the widow of Kristnama and claimed his estate.

If the marriage of defendant No. 2 proved to be valid, the plaintiff claimed a moiety of the estate of Kristnama, but the whole estate if the said marriage proved to be invalid.

Defendant No. 1 pleaded (1) that the plaintiff was debarred from bringing this suit by reason of a release executed by her on the 26th January 1857 to Kristnama; (2) that plaintiff having refused to live with Kristnama after his conversion, the latter married defendant No. 2 according to the rites of the Christian religion, and that this marriage was valid; (3) that the succession to the estate of Kristnama was governed by the Indian Succession Act, and that the plaintiff could have no claim to it.

Defendant No. 2 pleaded, *inter alia*, that she was legally married to Kristnama in the Free Church of Scotland Mission Hall at Madras in January 1858. She denied that Kristnama ever visited plaintiff after the said marriage or paid to plaintiff any money, and claimed that she was entitled to the whole estate of Kristnama.

On the 28th February 1883 Chittúr Anandáchári, the father of Kristnama, applied to be made a defendant in the suit and the application was granted. He denied that he was divided from his son or that the estate was the self-acquisition of his son, and claimed either to be jointly entitled with defendant No. 2 (if her marriage was valid) or solely entitled to the estate. He also pleaded that plaintiff was estopped from claiming the estate by the release of the 26th January 1857.

The issues settled by Innes, J., on 8th March 1883 were:—

(1) Whether plaintiff on, or since, the conversion of Kristnama ceased to be his lawful wife, and, as such, entitled to share in his estate under the Indian Succession Act.

(2) Whether defendant No. 2 is the lawfully married wife of Kristnama, and, as such, entitled to share in his estate.

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(3) Whether defendant No. 3, as father of the deceased, is entitled under the Indian Succession Act to share in his estate.

(4) To what shares each of such persons is entitled.

On the 5th of April 1883, on the application of the solicitors for defendant No. 1, another issue was framed by Kernan, J., viz.,

Whether the plaintiff, by virtue of the document of the 26th of January 1857, released her claim, if any, to the estate of Kristnama, and what effect has such document on the rights of the several parties to the said estate.

Mr. *Devarájáyyar* for plaintiff.

Mr. *Norton* for defendant No. 1.

Mr. *Johnstone* and Mr. *Shaw* for defendant No. 2.

Defendant No. 3 did not appear.

The case was heard by Kernan, J., on the 26th and 27th April 1883, and judgment was reserved. Before judgment was delivered defendant No. 2 died in September 1883 and the suit was revived on 7th February 1884. The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court.

Kernan, J. (after reading the plaint, written statement and issues, proceeded as follows):—There are certain facts not disputed, viz., that plaintiff is a Bráhman and the late A. Kristnama was a Bráhman, and that in 1849 or 1850 the plaintiff, being then of about or less than eight years old, went through a ceremeny of marriage according to the rites and ceremonies of the Hindú law to A. Kristnama, who was then a young man. It was not a betrothal merely that took place. The consummation ceremony and consummation never took place, but *otherwise* the marriage was completed with all the ceremonies necessary to constitute a Hindú marriage between Bráhmans. I offer no opinion whether such ceremony not followed by consummation amounted to a valid legal marriage according to Hindú Law. The view I take of the case does not require that I should express an opinion on this question in respect of which there was much argument before me. After the ceremony of marriage, while the plaintiff was still in the mother's or aunt's house, the late A. Kristnama abjured or abandoned the Hindú faith and religion and became Christian.. In

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1857, after plaintiff attained puberty, Kristnama proposed to plaintiff and her friends that the plaintiff should go to reside with him as his wife. She refused to do so on the ground that Kristnama, by becoming Christian, was an outcast. Her friends, aunt, mother and brother-in-law assisted her in her refusal. Kristnama endeavoured to oblige her to comply with his request by appealing to the magistracy, but by exhibit No. 5, dated the 19th January 1858, signed by her, addressed to A. C. Whittington, Magistrate of Chittúr zila, she declared that she would not go to live with him as he had become Christian and was an outcast. In that document the plaintiff stated that on the 21st of January 1857 Kristnama had sent to her a farikhut (release), executed by him, to remove the marital tie, and that she had executed a farikhut attested by witnesses, and she says to the Magistrate "you will therefore come to know the removal of the marital tie between myself and him." The farikhut, exhibit A(1), was produced, signed by the plaintiff, dated 26th of January 1857, and it is proved to have been signed by several of the witnesses whose names are signed thereto, amongst others by Rámánújáchári, her brother-in-law. Rámánújáchári proved that Kristnama wrote a similar farikhut at that time, and that it was given to the plaintiff's family, and that he believes plaintiff has got it. Plaintiff never lived with Kristnama and he never had intercourse with her. On the 14th of January 1858 the late defendant No. 2, Mangalam, a native of the East Indian Christian Presbyterian Church, was married to, or rather went through the ceremony of marriage with Kristnama according to the rites of the Presbyterian Church. This supposed marriage was made by the parties under the *boná fide* belief that it was a valid marriage binding in law and in conscience. Kristnama informed Mangalam that he had been married to the plaintiff, but that he had divorced her as she would not live with him, and he gave Mangalam exhibit 5 and exhibit A as

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(1) *The deed of release executed by Sinammál, daughter of Krishnamáchári, aged 16, caste Bráhman, residing at Sholinghúr, zila Chittúr, to A. Kristnama, late head gumasta of Sholinghúr, lately a Bráhman and now Christian.*

Though I married you a few years ago while you were a Bráhman, and since you have been adopting Christianity for the last few years, I have no intention of living with you. I have no claim whatever against you or anybody in connection with you. In case I prefer any claim for maintenance against you, such claim becomes invalid by this release.—SÍNAMMÁ. 26th January 1857.

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divorce documents. She kept and proved them before me. She stated he was divided from his father and brothers and that all the property he realized was the result of his own exertions. Under what circumstances or when any division took place was not proved. Kristnama died in December 1881 and defendant No. 1 is his administrator under grant of letters of administration. Kristnama never had a child. Upon the first issue I am of opinion that plaintiff did not cease to be the wife of Kristnama upon or after his conversion. She refused to live with him and so deserted him, as she lawfully might, because he became an outcast and therefore degraded—Vyavasthá Chandriká, s. 722 (vol. ii, p. 488).

Desertion does not mean divorce or dissolution *inter vivos* of the marriage—Vyavasthá Chandriká, vol. ii, p. 490. There cannot be said to be any such divorce in Hindú law, though there may be justifiable abandonment or desertion. The Act XXI of 1866 was passed to meet circumstances such as this case presents between plaintiff and Kristnama. According to Paráshara (Vyavasthá Chandriká, vol. ii, p. 489), if a husband be degraded, it is lawful for a woman to have another husband. Plaintiff did not take another husband. But, although the plaintiff did not cease to be the wife of Kristnama, she had not on his death any of the rights of a widow. According to the Hindú law, husband and wife are one—Manu, ch. ix, s. 45. Brahaspati, says, "In scripture and in the code of law, as well as in popular practice, the wife is declared to be half the body of her husband. Of him whose wife survives half the body survives." Vyavasthá Chandriká (vol. ii, p. 489).

If Kristnama had not been an outcast and degraded, plaintiff would inherit from him at least for life, his property, and she should have performed his funeral ceremonies by herself or by deputation. But, as he was and died an outcast, and his degradation was unatoned for, then, according to Hindú law, the marriage became absolutely dissolved and the relation of husband and wife. In Vyavasthá Chandrika, vol. ii, p. 490, it is said: "Nor is the marriage dissolved by the natural death of either of them, for then the person surviving, if without son, must, as widow or widower of the deceased, perform the funeral obsequies and continue to offer the oblation of food and libation of water to the manes .... of his or her deceased consort." A note is referred to in which it is stated that change of religion is regarded by Hindú

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law as degradation, and the case of *Muchoo* v. *Sahoo*(2) is quoted in which a husband, who was repudiated by his wife on his conversion to Christianity, was held not entitled to restitution of society. Vyavasthá Chandriká then proceeds thus: "The circumstance of one of the married couple refusing to associate with his or her degraded spouse, or that of the other dying in a state of degradation unatoned for, and the surviving one remaining pure at that time, is the only one that causes absolute dissolution of their marriage or the relation of husband and wife; as then ceases entirely all connection of the deceased with the survivor, who, in that case, is not to perform the deceased's funeral obsequies, not to offer periodically and annually the oblation of food and libation of water to his or her manes. Thus Sankha and Likhitá: Of him who has been formally degraded, the right of inheritance, the funeral cake, and the libation of water are extinct." The passage means the refusal continuing until the death of the degraded one. This is precisely what happened in this case. It is not alleged that plaintiff performed any ceremonies for Kristnama after his death. Plaintiff cannot therefore take the property of Kristnama by inheritance. She has no sacrifice, no pious duty to perform as regards Kristnama. Her connection with the deceased in the relation of wife ceased absolutely according to the Hindú law on his death. I think that by virtue of the farikhut mutually executed between plaintiff and Kristnama, plaintiff has released all claim on him. I do not think the release was of maintenance only. Whatever a widow takes of her deceased husband's property is partly for maintenance. Plaintiff alleged and gave evidence that Kristnama gave her money from time to time after their separation and during the time of Mangalam. I have very great doubt of the truth of this evidence, but, even if true, it does not alter my view or get rid of the effect of plaintiff's repudiation of him up to the time he died degraded. Mangalam does not admit the allegation. I am of opinion that plaintiff's case has failed and that the suit should be dismissed with costs to the first and second defendants and her representatives. Let notice of the decree be given to the Government Solicitor as plaintiff is pauper. As this suit is to be so dismissed, I do not see that I ought to try

(2) 5 W.R., 235.

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the second and third issues between the co-defendants. If plaintiff succeeded in establishing a title to any share of the estate of Kristnama, I could try the rights of the other parties, co-defendants *inter se*.

Solicitor for plaintiff : *Tiruvengadasámi Pillai.*

Solicitors for defendant No. 1 : *Branson & Branson.*

Solicitor for defendant No. 2 : *Carr.*

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. July 21. November 17.

PARVATHI (PLAINTIFF), APPELLANT,

and

MANNÁR (DEFENDANT), RESPONDENT.*

12 Cal. 424.
10 All. 425.
11 Bo. 104.
13 Mad. 34.
26 Cal. 655.
23 Mad. 1[illegible]
3 C.W.N. 552.
5 C.W.N. [illegible]
28 Cal. 4[illegible]
32 Cal. 1061.
3 C.L.J. 141.
34 Cal. 48.
42 Mad. 132
47 All [illegible]

Defamation—Slander—Action for abuse, no special damage being alleged—Damages, Measure of.

The rule of English law which prohibits, except in certain cases, an action for damages for oral defamation unless special damage is alleged, being founded on no reasonable basis, should not be adopted by the Courts of British India.

If defamatory expressions are used under such circumstances as to induce in the plaintiff reasonable apprehension that his reputation has been injured, and to inflict on him pain consequent on such belief, the plaintiff is entitled to recover damages without actual proof of loss sustained.

Semble : An action will not lie for vulgar abuse or hasty expressions ; but for malicious or culpable oral defamation an action will lie.

Vindictive damages should not be awarded, and a distinction should be drawn in awarding damages when the defendant acts from carelessness and when he acts maliciously. In the latter case the plaintiff is entitled to full compensation for the pain suffered, and in the former to a sum sufficient to establish his innocence of the charges made.

THIS was an appeal from the decree of E. K. Krishnan, Subordinate Judge of Tinnevelly, reversing the decree of T. Ádinárâyana Chetti, District Múnsif of Ambasamúdram, in Suit 303 of 1881.

The plaintiff, Parvathi Ammál, sued the defendant, Mannár Ayyar, for Rs. 1,000 damages. She alleged that, on the 29th June

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* Second Appeal 77 of 1884.

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1881, defendant, with the intention of defaming her publicly, abused her at Kadambadu Valavu, in the presence of the Village Múnsif and others, by falsely declaring that she was not the legally married wife of her husband, but a woman who had been ejected from several places for unchastity, and that her reputation had suffered thereby.

The defendant denied having used the alleged defamatory expressions, and pleaded that, even if he had used them, the occasion was privileged, inasmuch as he wished to prevent a marriage, then imminent, between his wife's brother's son with a girl brought up by plaintiff and her alleged husband.

The defendant attempted, in his defence, to prove the identity of the plaintiff with a woman of questionable character bearing the same name. The Múnsif disbelieved the evidence and awarded the plaintiff Rs. 300 damages and Rs. 145 costs, on the ground that she was a Bráhman and had been slandered publicly in the presence of the Village Magistrate and others of her caste.

On appeal the Subordinate Judge of Tinnevelly, E. K. Krishnan reversed this decree, holding that the defendant acted *boná fide* in making the imputations and trying to prevent the marriage of his kinsman with plaintiff's foster daughter.

Plaintiff appealed to the High Court.

Ambrose for appellant.

Bháshyam Ayyangár for respondent.

The judgment of the Court (Turner, C.J., and Muttusami Ayyar, J.) was delivered by

TURNER, C.J.—The question raised in this appeal is whether an action for damages for slander can be maintained without proof of special damages in cases in which it would not be allowed in English Courts. In two cases—*Subbaiyar* v. *Kristnaiyar*(1) and Appeal 2 of 1878 (unreported) the question was not decided.

In *Káshiram Krishna* v. *Bhadá Bápuji*(2) it was held under the special Regulation that an action would lie for abuse without proof of special damage.

In Bengal the authorities are conflicting.

In the later cases it was decided there could be no suit without an averment of special damage. *Phoolbasee Koer* v. *Parjun*

(1) I.L.R., 1 Mad., 383. (2) Bo. H.C.R. (A.C.), 17.

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Singh(1), *Chundernath Dhur* v. *Issuree Dossee*(2), *Nilmadhub Mookerjee* v. *Dookee Ram Kottah*(3), and in *Gopal Gurain* v. *Gurain*(4), special damage was found. The decisions which are apparently to the contrary are *Moulvee Gholam Hossein Vakeel* v. *Hur Gobind Dass Tahsildar*(5), *Shaikh Tukee* v. *Shaikh Khoshdel Biswas*(6), *Gour Chunder Puteetundee* v. *Clay*(7), where, however, the slander was of professional character, and *Sreenath Mookerjee* v. *Komal Kurmokar*(8). The latest case cited from the Bengal reports is to be found in the Calcutta Law Reporter.

It appearing, then, that no rule on the subject has been so definitely established by decided cases as to be imperative on us, we feel ourselves at liberty to discuss the propriety of the question on its merits.

The English law recognizes that defamatory words are actionable even without proof of special damage, although they may not impute a felony nor affect professional character, provided that they are written or printed and published, although the same words are not actionable if uttered *vivâ voce*. This distinction has been defended on the ground that the committal of the words to writing implies more deliberation, and that their publication in writing or in print is likely to be more extensive than a publication by oral utterance. Legitimate exception may be taken to both these grounds.

The essence of the cause of action is the harm suffered by the person defamed, and the question as to whether the injury was caused with more or less deliberation ought not to deprive the injured person of a civil remedy for the injury, though it may properly be considered if the Court is at liberty to award what are called exemplary damages. The difference between the extent of the publication of defamatory terms according as to whether they are committed to print or uttered orally is in reality accidental. Defamatory matter, when written, is frequently addressed only to a single person; when printed, its publication may be arrested immediately.

The publication of a defamatory imputation in a newspaper circulated extensively in a place where the person defamed is

(1) 12 W.R., 369. (2) 18 W.R., 531. (3) 15 B.L.R., 166.
(4) 7 W.R., 299. (5) 1 W.R., 19. (6) 6 W.R., 161.
(7) 8 W.R., 256. (8) 16 W.R., 83, 84.

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PARVATHI v. MANNÁR.

unknown may cause him far less injury, whether pecuniary or sentimental, than its publication orally, in the neighbourhood in which he resides, to his acquaintances or to persons who can influence his advancement in life.

In this country we are not bound to adopt the rules regulating compensation for injuries which are recognized by the English Courts, though it has been the practice of Judges in British India to regard the decisions of the English Courts with the highest respect as embodying the wisdom and experience of a judiciary whose reputation is second to none for independence and ability.

But the distinction drawn by the English law between written or printed and oral slander, which is said to have had its origin in the circumstance that the most frequent instances of oral slander were at one time punishable by Ecclesiastical Courts (2 Salkeld, 694), has been condemned by many eminent English lawyers. Mr. Starkie observes that the distinction "must be regarded as an absolute peremptory rule not founded in any obvious reason or principle." In *Roberts* v. *Roberts*(1), Cockburn, C. J., and Crompton and Blackburn, J.J., pronounced the law of England unsatisfactory and regretted they were bound by it. In *Lynch* v. *Knight*(2), the Lord Chancellor Campbell expressed the same views, and Lord Brougham, in the same case, declared that the English law was in this respect not only unsatisfactory but barbarous.

The Indian Law Commission, of which Lord Macaulay was a member, in its report on the proposed Penal Code, demonstrated that the English law regarding defamation was inconsistent and unreasonable. (Introductory Report, Note, p. 7, Macaulay's works, p. 546.)

The civil law does not recognize the distinction, nor does the law of Scotland; and the recommendations of Lord Macaulay's commission were approved and accepted by the British Indian Legislature. We therefore feel justified in giving effect to our conviction that the rule we are considering is not founded on natural justice and should not be imported into the law of British India.

It appears to us that disregarding the distinction between the

(1) 33 L.J., Q B., 248; 2 B & S., 384. (2) 9 H.L., 593.

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method of publication adopted, the questions which demand serious consideration are whether or not actions may be maintained for injury to the reputation which may result only in mental pain, and whether damages may be awarded which are in their nature more or less punitive.

If in any case it is allowable to bring such actions, it appears to us they should be permitted where a mischievous or malicious person has without foundation set in circulation defamatory charges against his neighbour.

It is often impossible to bring specific proof of the damage which a man may suffer in his business or in his friendships from such an injury.

The injury may be occasioned before he has any opportunity of rebutting the slander, and the memory of the slander may survive its contradiction, and may, at any time, influence his neighbours unconsciously to his disadvantage; nor is the suffering trivial which such a wrong may inflict on its victim.

It was observed by Best, C.J., in *DeCrespigny* v. *Wellesley*(1) that "if we reflect on the degree of suffering occasioned by loss of character and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter;" and by Holt, C.J., in *Baker* v. *Pierce*(2), "For my part, wherever words tend to take away a man's reputation, I will encourage such actions, because so doing will contribute much to the preservation of the peace."

And in *Button* v. *Heyward*(3) Fortescue, J., observed in reference to the *dictum* of Holt that it was also Hale and Twisden JJ.s' rule, and he thought it a very good one. Wider experience has persuaded English Judges that frivolous and vindictive litigation is countenanced by conceding too great liberty for the i[illegible]tion of suits for defamation, and it has been the object of the English law so far as possible to set limits to such actions. Some of the restrictions are already recognized by Indian law. Words of mere vulgar abuse are not punished as defamation. But we are not prepared to accept the limitation of the English law which denies a civil remedy unless pecuniary damage is established or may be predicted as almost certainly probable.

(1) 5 Bing., 406. (2) 6 Mod., 23. (3) 8 Mod., 24.

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We conceive that beyond the difficulty of estimating mental pain, there is no greater reason for refusing a man compensation for a wrong resulting in such pain than for refusing compensation for a wrong resulting in other physical suffering or in pecuniary loss, and that the true test of the right to maintain the suit should be whether the defamatory expressions were used at a time and under such circumstances as to induce in the person defamed reasonable apprehension that his reputation had been injured and to inflict on him the pain consequent on such a belief.

Mere hasty expressions spoken in anger or vulgar abuse to which no hearer would attribute any set purpose to injure character would of course not be actionable, but when a person either maliciously or with such carelessness to enquire into truth as is sometimes described as legal malice, deliberately defames another, we conceive that he ought to be held responsible for damages for the mental suffering his wrong-doing occasions. Without accepting the very wide rule of the Scotch law that anything is actionable which produces uneasiness of mind (Starkie, p. 30), we consider the action should be allowed where the defamation is such as would cause substantial pain and annoyance to the person defamed, though actual proof of damage estimable in money may not be forthcoming.

In the present instance the appellant had, in our judgment, established a *primâ facie* case, which, on the principles we have held applicable, would entitle her to relief. The Subordinate Judge finds that the defamatory statement was made, and he also finds that its truth is not proved; but he considers the respondent had some grounds for suspicion; that he, in fact, believed the statement to be true; and that, standing almost in the relation of a parent to a youth who was to be married, he made use of the defamatory expressions imputed to him in order to prevent the marriage.

If the expression has been used in a private place and only to the youth concerned, or to any of his relations who could influence him to renounce the marriage, the respondent might possibly have successfully pleaded privilege; but the evidence accepted by the Court shows he uttered them in the open street and to persons who had no concern with the marriage: the occasion, then, was not privileged.

We have already observed that one of the questions which

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present some difficulty in actions for defamation is the question, on what principle damages are to be assessed where no pecuniary injury is shown.

We are unwilling to give our adhesion to the principle of vindictive damages. The object of civil litigation should be the remedying of civil injuries. Recourse should be had to the penal law if public interests require the punishment of an offender or an example to deter others from the commission of the offence.

Nevertheless, reason suggests that a distinction should be drawn between cases where the slanderer acts from mere carelessness, or in an honest but mistaken belief as to his duty, and cases where the slanderer is insolent without any provocation or is influenced by a desire to gratify his enmity. The person defamed may be content to accept a sum sufficient to establish his innocence of the charges made in the former case; in the latter he is entitled to full compensation for the pain inflicted on him.

As to the good faith of the respondent, it is not shown that he made any reasonable inquiry into the truth of the defamatory statements to which he gave circulation. On the contrary, it appears that he made them after they had been proved untrue, and in this suit he has again maintained their truth and has given evidence to establish it. Under the circumstances, we consider the appellant entitled to reasonable damages, and we shall reverse the decree of the Appellate Court and restore that of the Múnsif. As to costs, it is usual in such cases to allow costs on a scale somewhat in excess of the amount of damages actually awarded, because it is impossible for a plaintiff to value his claim precisely. We shall affirm the order of the Múnsif as to the costs in his Court and award the appellant her costs in this Court and in the Appellate Court on the sum decreed.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884. July 25. November 20.

13 Mad. 30.
8 Bom. 747.
2 Cal. 695

VENKATRAYUDU (THIRD DEFENDANT), APPELLANT,

and

PAPI REDDI (PLAINTIFF), RESPONDENT.*

Registration—Unregistered conveyance—Covenant to pay money contingent on ejectment—Suit for money dismissed.

By an unregistered document A stipulated that B should enjoy certain land for a term of years in order that a debt and interest might be liquidated by receipt of profits, estimated at a fixed sum, and it was provided that, if B's possession was disturbed in the meantime, A should pay the balance of the principal then due and interest from the date of the loan. B, having been ejected, sued A upon the covenant to pay.

Held, that, as the covenant to pay depended on the principal contract, which could not be proved for want of registration, B could not recover.

THIS was an appeal from the decree of J. Wallace, District Judge of Cuddapah, dated 9th July 1883, reversing the decree of V. Subramanya Sástri, District Múnsif of Proddatúr, in Suit 81 of 1882.

The plaintiff, Velugoti Papi Reddi, sued to recover Rs. 682 from the defendants, Karnam Venkata Subbaya and three others. The plaintiff alleged that defendant No. 1 executed a usufructuary mortgage bond in his favor on the 8th July 1873 for Rs. 528. By this bond it was provided that plaintiff should enjoy certain land for a term and credit Rs. 24 per annum towards the debt until it was liquidated, and that, if plaintiff's possession should be disturbed, the balance then due should be paid with interest at the usual rate from the date of the bond.

The plaintiff having been ejected claimed Rs. 336 principal and Rs. 346 interest. Defendants 1, 2 and 4 were *ex parte*. Defendant No. 3 pleaded that defendant No. 1 was divided from him in interest and was not the owner of the land mortgaged, and that the bond could not be received in evidence as it was not registered.

* Second Appeal 567 of 1883.

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VENKATRAYUDU v. PAPI.

The judgment of the District Múnsif was as follows:—

"In *Stri Seshathri Ayyangar* v. *Sankara Ayen*(1) and *Guduri Jagannadham* v. *Rapaka Ramanna*(2) the Court held that a document required by s. 17 of the Legislative Act to be registered, but not so registered, could be received in evidence for the purpose of proving the money claim. But in *Mattongeney Dossee* v. *Ramnarain Sadkhan*(3) the Calcutta High Court held that even for the purpose of proving the money claim such a document could not be received in evidence. There is thus a conflict of decisions between the learned Judges of the two courts, but I think a distinction may be drawn in the nature of the documents sued on. In the two Madras cases the bonds were mere hypothecation bonds, under which the obligors bound themselves to pay the money borrowed with interest and charged the immovable property as collateral security, so that, independent of any transaction affecting immovable property, there was an obligation to pay the money; and to prove that obligation it was held that the bond could be received in evidence. In the Calcutta case the bond provided that in default of the payment of the money secured by it within a specified time the property mortgaged should be sold in satisfaction of it. The learned Chief Justice of the Calcutta High Court doubted whether the obligee had a personal remedy against the obligor for the money, but apart from this his Lordship held that the document was not divisible and disclosed one transaction only, and that the transaction which the plaintiff must necessarily prove for the purpose of making out his case.

"Notwithstanding the distinction in the nature of the bonds, it does seem to me that there is a conflict of opinion between their Lordships of the Madras High Court and those of the Calcutta High Court, as the latter expressed their concurrence in the opinion of the Lower Court that the borrowing and lending was in itself a transaction affecting the property comprised in the document, and that, therefore, the document not being registered could not be received as evidence of the transaction, *i.e.*, the borrowing and lending. If, therefore, the document in this case were similar to those in those cases, the question might arise as to which decision is to be followed; but it seems to me to be quite of a different nature. Under this document plaintiff was to enjoy the

(1) 7 M.H.C.R., 296. (2) 7 M.H.C.R., 348. (3) I.L.R., 4 Cal. 83.

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lands comprised in it until the amount secured by it was discharged at 24 rupees a year, and it goes on to make a contingent provision that, if plaintiff should at any time be deprived of possession of the lands, he should be entitled to recover the balance with interest. The document is, therefore, in my opinion, indivisible, as observed by the learned Chief Justice of the Calcutta High Court. There is no primary obligation under it for payment of money, while, on the other hand, it is made contingent on the plaintiff being dispossessed of the lands. If this contingent provision is set aside, the obligation to pay the money does not arise, and this provision is, in my opinion, a transaction affecting the immovable property comprised in the document within the meaning of s. 49 of the Registration Act, and the document cannot be received in evidence to prove it. It was argued for the plaintiff that, as he does not claim the immovable property comprised in the document, the reception of it in evidence does not in any way affect such property. But the section of the Act not only lays down that the document shall not affect the immovable property, but that it shall not be received as evidence of any transaction affecting such property. Now, dispossession of lands usufructually mortgaged to the plaintiff is, in my opinion, a transaction affecting such property, and unless that provision is proved, plaintiff cannot succeed. In this case it is not sufficient to prove the bare transaction of lending and borrowing. Plaintiff cannot succeed without proving the transaction of usufructuary mortgage, and the contingent provision in case of dispossession, and, to prove that, the document cannot be received in evidence. I must, therefore, hold that the document A cannot be received in evidence for the purpose of this suit."

On appeal, the District Judge decreed for plaintiff on the ground that the bond A might be regarded as a mere memorandum of money due and of the mode in which it became due.

Defendant No. 3 appealed.

Sankaran Náyar for appellant.

Mr. *Shaw* and Mr. *Norton* for respondent.

The Court (Turner, C.J., and Hutchins, J.) delivered the following

JUDGMENT:—The transaction mentioned in the plaint was not a mortgage in the strict sense of that word, but a sale for a term of years for 132 pagodas. A condition was incorporated in the deed

for the protection of the term, viz., that if the grantor failed to observe the stipulations of the deed, he would pay the principal after deducting the profits received and interest from the date of the bond.

VENKATRAYUDU v. PAPI.

The bond was not registered. Default has been made in the provisions of the deed and the property has been resumed by the brothers of the grantor.

Suit is now brought to enforce the covenant, and the question is raised whether, inasmuch as the bond was ineffectual to create title, a suit can be maintained upon the covenant.

It appears to us that the covenant was a contract depending upon the principal contract, and that if the first contract was, as it must be held to be, invalid, the second fails.

The decree of the Judge is reversed and that of the Múnsif restored, but, under the circumstances, without costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

1884. September 24. October 22.

MALLIKARJUNUDU (PLAINTIFF), APPELLANT,

and

MALLIKARJUNUDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Mortgage of 1832 by way of conditional sale—Regulation XXXIV of 1802—Muhammadan mortgagor.

In 1832 a Muhammadan mortgaged certain land with possession on condition that if the money lent was not repaid within eight years, the land should be enjoyed by the mortgagee after that period as if conveyed by sale.

In 1883 a suit was brought to redeem.

Held, that the title of the mortgagee became absolute by virtue of the terms of the contract on default of payment within the time specified.

The obligation cast by Regulation XXXIV of 1802 upon a mortgagee to account for profits does not prevent a mortgage by way of conditional sale from becoming, after the period for redemption has elapsed, an absolute sale where no account has been rendered by the mortgagee.

The rule laid down in *Pattabhiramier's case* (13 M.I.A., 560) applies to a mortgage executed by a Muhammadan.

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* Second Appeal 463 of 1884.

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MALLIKARJUNUDU v. MALLIKARJUNUDU.

THIS was an appeal from the decree of J. Kelsall, District Judge of Godávari, confirming a decree of T. R. Mulhari Ráu, District Múnsif of Ellore, in Suit 9 of 1883.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of Kernan, J.

Bháshyam Ayyangár for appellant.

The Advocate-General (Hon. *P. O'Sullivan*) for respondent.

KERNAN, J.—The Original Suit 9 of 1883 stated that Sherif Ali Sahib and others received a loan of Rs. 1,500 from the father of defendants Nos. 1 and 2 and gave a usufructuary mortgage of lands set out in the plaint, and that the sons of the mortgagor transferred their interest in the lands to the plaintiff in order that he might redeem the mortgage on payment of Rs. 1,500.

The mortgage relied on was proved (exhibit A); it is dated the 5th of January 1832, and after acknowledging receipt of Rs. 1,500, it proceeded thus: "we have mortgaged and put in your possession all the lands within the boundaries (there stated), and delivered over the deeds specified to you." "Therefore, whenever the said money is paid in one instalment, before the expiry of eight years, payment should be credited on this bond." "On account of the interest of the mortgage you should cultivate (the land) and enjoy the profits thereof." "If the money be not paid within the period fixed for payment, you should enjoy the said lands immediately after the expiry of that period as (if conveyed by) an absolute sale for the current price."

The eight years for redemption mentioned in exhibit A expired on 6th of January 1840; default was made in payment within the eight years; the grantee or mortgagee and his descendants have been in possession of the lands since the 5th of January 1832. The lands are stated by defendants Nos. 1, 2, 3, and 4 to have fallen to the share of the defendant No. 2 on a partition between the members of his family. Defendant No. 2 is the principal defendant. Defendants 5 and 6 are *ex parte*, but appear to have no interest in the lands.

The only issue necessary to refer to is the first, viz., whether, on occurrence of the default, the stipulation for sale has or has not executed itself.

The Múnsif in the first instance, and the District Judge on appeal, held that the conditional sale became absolute and dismissed

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the suit with costs, following the decision of the Privy Council in *Pattabhiramier* v. *Vencatarow Naicken*(1), approved of by the Privy Council in *Thumbuswami Moodelly* v. *Hossein Rowthen*(2) followed by *Bapirázu* v. *Kamarázu*(3).

The second ground of appeal is "that the mortgage in question was executed in 1832, at which time only the equivalent to 12 per cent. interest could be allowed out of the produce of the land and no further interest could be allowed."

The third ground is "that the instrument of 1832 could not have 'executed itself' as a conveyance in 1840, as an account should have to be taken as to whether any amount was due to the mortgagee at that time."

At the hearing of this second appeal, it was not contended that the grantor covenanted to pay the amount of Rs. 1,500 or that the terms of the instrument of 1832 showed that the parties contemplated that any account of profits or produce of the land should be taken before the sale became absolute. Therefore the principle of the decision in *Pattabhiramier's case* and *Thumbusami's case*, followed in *Bapirázu* v. *Kamarázu*, applies to this case.

But for the appellant it was argued that in applying that principle there should have been a decree for the plaintiff upon the ground that the effect of Regulation XXXIV of 1802 was in point of law to annex to, or import into, the usufructuary mortgage of 1832 an obligation on the mortgagee to account for profits, and that interest in the shape of profits beyond 12 per cent. per annum on the amount borrowed should in such account be credited to principal.

It was further contended for the appellant that the parties to the mortgage of 1832 must be treated as having contracted subject to the provisions of the Regulation of 1802 (repealed in 1855), and as the object of that Regulation was for the public purpose of preventing usury, it was not competent for the mortgagor to waive the benefit of the account given by that Regulation or to agree that the sale should be absolute before such account was taken. On these grounds it was contended that, as the mortgagor was in point of law bound to render an account before the contract could

(1) 13 M.I.A., 560. (2) I.L.R., 1 Mad., 1; s.c. L.R., 2 I.A., 241.
(3) I.L.R., 3 Mad., 26.

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execute itself, the case comes within the decision in *Thumbusawmi's case*. In that case, however, the Privy Council held that, by the terms of the contract, the parties expressly provided that an account should be taken at the end of the period of enjoyment by the mortgagor, and did not contemplate, as in *Pattabhiramier's case*, that the sale should become absolute on the non-payment of the mortgage money within the period agreed on.

The case of *Bapirázu* v. *Kamarázu* was that of a mortgage of 1846 with possession, and with a provision that if the mortgage money was not paid within the time limited, the sale should be absolute: the time expired in 1848.

Mr. Justice Innes, in giving judgment (in which the Chief Justice concurred), after going through *Pattabhiramier's* and the other cases, says: "The question therefore in contracts made before 1858 is narrowed to what was the intention of the parties as gathered from the instrument itself." See also *Rámásámi Sástrigal* v. *Samiappana Náyakan*.(1) In *Bapirázu* v. *Kamarázu* no doubt the question now raised by the Vakil for the appellant was not in terms put forward or decided. In *Thumbusawmi's case* Mr. *Mayne* suggested this very question. But the Privy Council did not give any weight to it, and held that in the contract in *Thumbusawmi's case* there was an express provision for accounting; that in this respect the latter case was not governed by the decision in *Pattabhiramier's case*.

However, the Privy Council in *Pattabhiramier's case* considered the effect of the Regulation of 1802 with reference to the contract in that case, which is in substance the same as the contract in this case. In the judgment it is stated, "The transaction was one of usufructuary mortgage: this usufruct to be taken in lieu of interest; and the first question is, was there any rule of law to prevent the Court from giving effect to such a contract according to the intent and meaning of the parties plainly expressed by its language?" Referring to the Regulation of 1802 as having been introduced into Madras from Regulation XV of Bengal, 1793, the Court say: "Both these Regulations were passed with the object of fixing the rate of interest and preventing the taking of interest in excess of it. The clauses (8 and 9, Madras; 9 and 10, Bengal) in question affected only that part of the contract now under

(1) I.L.R., 4 Mad., 179.

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consideration, which related to the usufruct of the property. As to that, they have made it necessary, contrary to the intention of the parties, to take, upon a redemption, an account of the rents and profits as between *mortgagor and mortgagee in possession*, compelling the latter to set what he might have received in excess of legal interest against principal; but they have neither *extended the time for redemption, nor imposed on the mortgagee the obligation of taking any judicial or other proceeding* in order to make his title absolute." The Court refers to a case in Bengal, where the contract, similar to that in *Pattabhiramier's case*, was made, subject to the Regulations of 1793 and 1798, similar to the clauses 8 and 9 of Madras Regulation, 1802. There the mortgagor sought to redeem after the period of redemption had expired, but the suit was dismissed on the ground that the sale had become absolute and was not therefore affected by the provisions of the Regulations of 1793 and 1798. The agreement of the parties to the contract, as specified in the contract itself, is the test whether the instrument of contract is to be treated as a continuing mortgage liable to be redeemed or an absolute sale.

The argument for the appellant that the mortgagor had, up to the day of the expiry of the period for redemption, to pay or tender the amount due and file a suit to require an account, does not meet the case. No doubt within the period of redemption the mortgagor had that right, and if he exercised it within the limited period, he would have had the benefit of the Regulations, and limited the mortgagee to 12 per cent. per annum interest. But, as decided by the Privy Council, the Regulation did not extend the time for redemption nor impose on the mortgagee any obligation to take any proceedings to foreclose or any other proceeding to make his title absolute. It is clear that the obligation to account imposed by the Regulation was not considered by the Privy Council to affect the absolute right of the mortgagee when the mortgagor failed to redeem within the limited period. There was no accountability on the mortgagee after the limited period of redemption expired. Therefore the arguments founded on the existence of the mortgagee's obligation to account fails. The contention that it was not open to the parties to waive the benefit of the Regulation is answered by the decision that the Regulation did not make the contract for absolute sale, without account, illegal. The Regulation

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MALLIKARJU-NUDU v. MALLIKARJU-NUDU.

enabled the mortgagor, contrary to his contract, to have account of profits taken and to limit the mortgagee to 12 per cent. in the case of ordinary mortgage contracts, and also in the case of mortgages by conditional sale where payment was made within the period limited; but did not provide that account should be taken after a mortgage by conditional sale became, under the contract, absolute by the failure of the mortgagor to redeem within the limited period. The Regulation provided for cases where the relation of mortgagor and mortgagee was continuing either in fact or law and not for cases where that relation legally ceased. In Bengal the Regulation XVII of 1806 was introduced to meet such cases, but there was no such Regulation passed for Madras. The appellant's Vakil alleged that the profits of the land were 300 rupees per annum, but there was no proof given of the fact. If such were the fact, no doubt the interest received would have exceeded 12 per cent. per annum. But that fact would be immaterial after the plaintiff allowed the limited period to elapse without redeeming, unless he alleged in his plaint that the real object of the contract was to evade the usury laws. There is no such allegation in the plaint, and the mortgagee and defendant No. 2 claiming under him have been in possession for upwards of forty years under the contract of 1832, which "executed itself" in 1840.

It was objected that the decisions do not apply as the mortgagors are Muhammadans. But in *Pattabhiramier's case* the Court states that such contracts are recognized and enforced between Muhammadans, and the case of *Surrufun-nissa* v. *Shaik Enayet Hussein*(1) and other cases referred to by the Privy Council were between Muhammadans. I am of opinion—

(1.) That the Regulation XXXIV of 1802 applied to Muhammadans.

(2.) That the question whether interest exceeding 12 per cent. could be allowed out of the produce of the land does not arise as it was competent to the mortgagor and mortgagee to enter into the contract of 1832, whereby the transaction became an absolute sale on the admitted failure of the mortgagor to redeem at the expiration of the limited time.

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(1) 5 W.R., 88.

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(3.) The mortgage not having been redeemed within the limited time, the contract of 1832 executed itself, and the mortgagee was not after that time bound to render any account to the mortgagor, nor could the mortgagor after that enforce such account or redemption.

This appeal is dismissed with costs.

BRANDT, J.—I concur in thinking that the appeal fails. It was argued that the mortgage by way of conditional sale is still redeemable by reason of the liability of the mortgagee to account; that no such mortgage by way of conditional sale can become absolute so long as there is accountability between the mortgagor and mortgagee. Admitting the last proposition for the sake of argument, it appears to me that the case for the appellant is disposed of by the fact that the liability to account continued only so long as the relationship of mortgagor and mortgagee subsisted, and that that relationship ceased when the period limited by the contract between the parties expired; the contract then executed itself and the sale became absolute, "without any further act of the parties *or accountability between them.*"

It was, in my opinion, the clear intention of the parties in this case that, on default made as contemplated, the land should become the absolute property of the creditor, and that, on that event happening, as it did, all privity between the parties ceased.

Even if the appellant is not directly concluded by the decisions of the Privy Council quoted at length by my learned colleague, there is certainly, as it appears to me, nothing in those decisions to support the contention of the Vakíl for the appellant, and no authority, and no principle of law on which it can be held that the appellant is, in the year 1883, in a position to call for an account in respect of, and to redeem, a mortgage by way of conditional sale which became absolute in 1840, by reason of the existence, at the time when the contract was entered into, of a Regulation passed to prevent the taking of interest in excess of a rate then fixed by law, under which Regulation, had the mortgagee offered to redeem within the time limited under the terms of his contract, the mortgagee would have had to account for all profits received in excess of profits equivalent to the rate of interest then allowed by law.

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I also entirely concur in thinking that there is nothing in the argument that the decisions quoted are not applicable by reason of the parties to the agreement of 1832 having been Muhammadans.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. September 4. November 17.

11 mad. 220. 17 mad. 265. 412. 30 mad. 471. 36 all 51c

SESHADRI (FIRST DEFENDANT), APPELLANT,

and

KRISHNAN AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code, ss. 544, 622—Appeal against appellate decree by party to suit who did not appeal against original decree.

S having mortgaged land to K as security for a debt, sold it to V, who undertook to pay the debt. K, alleging that C had undertaken either to make V pay the debt or to execute a mortgage of his own land to secure its repayment, and that V had dispossessed him, sued S, V and C to recover the debt by sale of the land mortgaged, mesne profits from V, and costs from S, V and C.

The District Múnsif decreed payment against S; mesne profits, and in default of payment by S, a sale of the land against V; and costs against S, V and C.

V and C appealed against this decree.

The Subordinate Judge found that the debt had been paid and held that, even if the debt had not been paid, K had no cause of action against V or S, but, if at all, against C, and dismissed the suit as against V. The Subordinate Judge also held that he had no jurisdiction to interfere with the decree against S, and saw no reason to interfere with the decree against C.

S appealed against this decree.

Held, that even if S was not entitled to appeal in order to have the decree against him set aside, the error of the Subordinate Judge could be corrected under s. 622 of the Code of Civil Procedure by a direction to exercise the discretionary power given by s. 544 of the said Code.

THIS was an appeal from the decree of P. Tirumal Ráu, Acting Subordinate Judge of Tinnevelly, dated 21st August 1883, modifying the decree of T. Adináráyana Chetti, District Múnsif of Ambasamudram, in Suit 138 of 1881.

The facts and arguments appear from the judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.).

Bháshyam Ayyangár for appellant.

Mr. *Wedderburn* for respondents.

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* Second Appeal 1047 of 1883.

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Seshadri v. Krishnan.

JUDGMENT.—Seshadri Ayyangár mortgaged ·77 of an acre of land to the father of the plaintiffs, Krishna Chetti and his two brothers (minors), and borrowed from him Rs. 750 on the 4th of April 1877. On the 11th August 1877 he sold the land to Vyravan Pandáram, defendant No. 2, subject to the mortgage, which defendant No. 2 undertook to discharge.

The plaintiffs alleged that Chinna Rámánújayyangár, defendant No. 3, who was indebted to them in a sum of Rs. 350, undertook either to cause defendant No. 2 to pay the mortgage amount or himself to execute a deed mortgaging his own lands for Rs. 1,100, to be made up of the mortgage debt contracted by defendant No. 1 and of his own mortgage debt.

The defendant No. 2 pleaded that the mortgage debt in suit had been discharged by payment.

The defendant No. 3 denied the alleged agreement on his part, and asserted that his own mortgage debt had also been discharged.

Defendant No. 1, while admitting the mortgage, contended that he had been unnecessarily made a party to the suit.

The Court of First Instance accepted the evidence adduced by the plaintiffs to prove that the defendant No. 3 had undertaken to execute a mortgage deed for the combined amounts of the mortgage debt due by him and the mortgage debt due by defendant No. 1, and found that the allegation as to discharge of the mortgage debt contracted by defendant No. 1 was disproved; it therefore passed a decree for the recovery of the amount from defendant No. 1, and, in default, from the mortgaged property, and charged all the defendants with the costs of the suit.

The defendants Nos. 2 and 3 appealed from the decree.

The defendant No. 1 did not appeal.

The Subordinate Judge found that the mortgage debt was discharged by payment, and, on this ground, he reversed the decree against defendant No. 2.

It is apparent that this ground was a ground common to all the defendants, and that it was incongruous that the claim should be dismissed against defendant No. 2 on the ground that the mortgage was satisfied, and the decree of the Múnsif left subsisting against defendant No. 1 on the ground that the mortgage had not been discharged. It was to prevent such incongruities that the

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SESHADRI v. KRISHNAN.

Procedure Code conferred upon an Appellate Court, when an appeal is presented against the whole decree, a power to interfere as well on behalf of parties who had not appealed as on behalf of parties who had appealed.

The Subordinate Judge appears to have misapprehended the power he possessed, for he intimates in his judgment that he had no jurisdiction to interfere with the judgment of the Múnsif so far as it related to defendant No. 1.

Another incongruity appears in the face of the judgment of the Subordinate Judge in that he expressed himself unable to see any reason to interfere with the Múnsif's order directing defendant No. 3 to bear his costs. It is obvious that if the judgment of the Subordinate Judge is correct as to the discharge of the first mortgage, there were no grounds why a suit should have been brought against defendant No. 3, and he should therefore, in accordance with the ordinary practice, have recovered his costs from the plaintiffs.

The defendant No. 1 has presented a second appeal to this Court, and it is objected that inasmuch as he did not appeal from the decree of the Múnsif to the Appellate Court, he has no *locus standi* to maintain the appeal.

The learned pleader for the appellant contends that a right of appeal accrued to his client because the Subordinate Judge neglected to discharge the duty cast upon him by the Code. He argues that in conferring the power upon an Appellate Court to interfere on behalf of a party to the suit who was not a party to the appeal, it was the intention of the Legislature that this power should be exercised in every case unless there were substantial reasons for not doing so.

Without going so far as to rule that in every case an Appellate Court is bound to interfere, we admit that the case before us is one in which it could hardly have been justified in refraining from interference if its finding on the issue as to the discharge of the mortgage is correct. The appellant, so long as the judgment of the Court of First Instance subsisted, may well have been unconcerned to present an appeal from it, for he had a right to call upon defendant No. 2 to discharge the debt if he was compelled to do so; while the mortgaged property in the hands of defendant No. 2 was still liable for the satisfaction of the mortgage, and it

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might reasonably be presumed that if the property was adequate, the decree-holder would take the most assured way of realizing his decree by proceeding against it. When, however, the Appellate Court declared the property no longer subject to the mortgage, the position of the appellant was materially altered.

SESHADRI v. KRISHNAN.

We have felt some difficulty in holding that a person who thus abstains from presenting an appeal can afterwards present a second appeal with a view of specifically raising the question which he should have raised by an appeal; and had the Subordinate Judge apprehended the power he possessed, and reasonably exercised it, we should have held that there were no grounds for allowing the appellant to maintain a second appeal. But inasmuch as the Subordinate Judge believed that he was not allowed to interfere on behalf of the appellant, we conceive that the appellant may be permitted to insist in this Court on the Subordinate Judge's error and to require that the Subordinate Judge shall be called upon to exercise the power which has been conferred upon him. If the appellant has no right of second appeal, the error which he brings to the Court's notice is one which we may at least correct under s. 622, and, in order that justice may be done, we shall direct the Appellate Court to consider whether, in the reasonable exercise of its powers under s. 544, the decree should not be set aside as against this defendant, and, if it comes to the conclusion that it ought to exercise the power, we shall direct it to give effect to that conclusion. It will, of course, be understood that the respondents must be allowed to appear and show cause, if they can do so, why the power should not be exercised in the appellant's favor.

We shall direct each party to bear his or their own costs of this appeal.

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21 Mad. 119.
27 Mad. 170.
46 Mad 177

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884. Nov. 4, 20.

BASKÁRASÁMI AND OTHERS (DEFENDANTS), APPELLANTS,

and

SIVASÁMI (PLAINTIFF), RESPONDENT.*

Rent Recovery Act, s. 2—Tenant—Lessee of zamíndár—Limitation.

In 1869 a village in the zamíndárí of R was granted by the zamíndár to S at a favourable rent, in consideration of S renouncing a claim to the zamíndárí. The village was not separately assessed and divided off from the zamíndárí. The rent having fallen into arrears, the village was sold in 1875 under the provisions of the Rent Recovery Act and purchased at the sale by the Agent of the Court of Wards on behalf of the defendants, minor sons of the deceased zamíndár.

In a suit brought by S, in 1883, to recover the village:

Held, that the sale was binding on S and that the suit was barred by limitation.

THE plaintiff, Sivasámi Séthupati, sued the defendants, Baskárasámi and Dinkarasámi, minor sons of Mutturámalinga Séthupati, late zamíndár of Ramnád, represented by the Collector of Madura, as Agent of the Court of Wards, to recover the village of Karuttanendal and mesne profits for three years prior to suit.

By an agreement made on the 11th July 1868 between plaintiff and the father of the defendants, the father of the defendants promised, in consideration of a promise by plaintiff to renounce his claim to the zamíndárí, to grant to plaintiff Rs. 4,000 for a house, a monthly allowance of Rs. 50, and the village now sued for, upon which the kist was to be fixed and which was to be registered in plaintiff's name.

By a subsequent agreement, dated 25th August 1869, the plaintiff, in consideration that the village had been granted to him at a low kist, at his request, agreed that the village should not be registered in his name and separated from the zamíndárí, and also renounced his claim to the monthly allowance. The kist of the village was fixed at Rs. 350.

* Appeal 63 of 1884.

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In 1871, plaintiff (repudiating these agreements) sued the father of the defendants to recover the zamíndárí, and his claim was eventually rejected by the Privy Council.

In 1875, while the litigation was pending, a notice was issued by the Assistant Collector on 7th May, under s. 39 of Act VIII of 1865 (Madras), to the plaintiff to pay arrears of rent due on the village.

The arrears were not paid and the village was sold under the provisions of the said Act and purchased by the Agent to the Court of Wards (the Collector) on behalf of the defendants.

The plaintiff charged that the sale was illegal on the ground that the notice was not duly served upon him.

The defendants pleaded that the sale was valid and that the suit was barred by limitation.

The Subordinate Judge of Madura, A. Mangalam Pillai, found that there was no proof that plaintiff was aware of the sale and held that he was not bound by it, and, therefore, held that the suit was not barred by limitation. Upon the other principal issues in the suit, viz.,

ii. Whether the defendants were competent to institute proceedings under the Rent Recovery Act against the plaintiff.

iv. Whether the sale was valid.

The judgment of the Subordinate Court was as follows :—

"The second and fourth issues are the material issues in the suit. They concern the question whether the defendants' proceedings which eventuated in the sale of the property are legalized by the Rent Recovery Act under which those proceedings began and ended. This involves the determination of the point whether the relationship between plaintiff and defendant is that of a landlord and tenant as defined by that Act. This relation has been clearly expounded by the highest tribunal. I refer to the decision of the Privy Council in *Rámásámi* v. *Baskárasámi*.(1) The relation of a landlord and tenant has been explained to be the relation existing in respect of the cultivation of land independently of the exchange of pattá and muchalká, and giving the right to both the landlord and tenant to demand written agreements of each other.

(1) I. L.R , 2 Mad., 67.

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BASKÁRASÁMI v. SIVASÁMI.

These written agreements are called pattás and muchalkás. These documents are liberated by the Registration Act from the obligation of registration and there are no other documents defined or described in the Rent Recovery Act as pattás and muchalkás.

"Now, it cannot be controverted that, under the Rent Recovery Act, s. 7, no proceedings can be initiated for recovery of rent in the absence of exchange of pattá and muchalká. It is urged that the documents under which plaintiff obtained the village supply the place of pattá and muchalká. These documents purport to embody the stipulations of a perpetual lease granted to plaintiff for a favourable rent, and are therefore documents much akin to the document considered by their Lordships of the Privy Council in the decision above cited and pronounced by their Lordships to be other than a pattá. They have also decided in the case under reference that there is no relation of landlord and tenant such as is contemplated by the Rent Recovery Act in reference to the execution of pattás and muchalkás, between persons who are privy to a lease made for money lent and received. This decision is applicable to the present case for the simple reason that here we have a lease granted in consideration of a renunciation of certain rights which the lessee laid claim to against the lessor. So that, for two reasons, viz., that the relation of landlord and tenant does not subsist between the plaintiff and defendants, and that assuming such relation to exist, there has been no exchange of pattá and muchalká between them, the entire proceedings that eventuated in the sale of the plaint-village are illegal *ab initio*.

"About the service of notice it appears from the evidence that it was stuck upon a tamarind tree near the Pilliar's (Belly-God's) temple in the plaint-village, because plaintiff was not found in his own residence at Ménátí—see exhibit I. There was therefore proper service of the notice under s. 39 of the Rent Recovery Act."

The plaintiff obtained a decree for possession of the village and for Rs. 397-0-8 mesne profits.

The defendants appealed to the High Court.

The Government Pleader (Mr. *H. H. Shephard*) for appellants.

Bháshyam Ayyangár for respondent.

The Court (Turner, C.J., and Hutchins, J.) delivered the following judgments:—

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TURNER, C.J.—Looking to the course of legislation in this Presidency, it was held in *Subbaraya* v. *Srinivasa*(1) by Mr. Justice Muttusámi and me that the word 'tenant' in Act VIII of 1865 was intended to include a farmer or lessee, and that such tenants have as against the superior landlords and the landlords against such tenants under the Act the same summary remedies as they respectively enjoyed under the Regulation. In this view the sale was valid, if the respondent was a lessee.

It is impossible to hold that he was not a lessee at the time of the sale. It had been originally intended that he should hold the estate as a sub-division of the zamíndárí with a separate assessment payable directly to Government; but it was subsequently arranged that he should hold it at a favourable rent under the zamíndár, so that the 50 rupees' allowance which he was to receive from the general revenues of the zamíndárí should be permanently secured to him.

Most unwisely he thought fit to repudiate the arrangement, and the zamíndár, as he was entitled to do, took advantage of the default to bring the lease to sale.

The suit is, in my judgment, barred by limitation and must be dismissed with costs. I at the same time express a hope that the minor zamíndár when he comes of age may waive the default of his kinsman and restore the village to him.

HUTCHINS, J.—The respondent would certainly come within the definition of a 'tenant' given in s. 2 of the Act; and though the subsequent sections, dealing with the two classes of landholders and the tenants under them, respectively, raise some doubt whether a lessee of a zamíndár is a tenant intended to be affected by the Act, I find the point has already been considered by this Court, and I am content to accept the conclusion then arrived at.

I, therefore, agree that the suit should be dismissed with costs.

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(1) I.L.R., 7 Mad., 580.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884. November 20.

12 Mad. 424. 4 Rangoon. 238

MUTHA (THIRD DEFENDANT), APPELLANT,

AND

SÁMI (PLAINTIFF), RESPONDENT.*

Pledge of mortgage bond—Fraudulent sale by mortgagor—Suit to enforce mortgage against bonâ fide *purchaser.*

A prior encumbrancer will not be postponed to a subsequent encumbrancer unless he has been guilty of gross negligence.

A mortgaged land to B. B having bought certain land from C pledged his mortgage deed to C to secure the unpaid purchase money. C gave the bond to A who was his brother-in-law.

A representing to D that the mortgage was redeemed, sold the land to him giving him the bond as a title-deed.

In a suit by B against D to recover the mortgage amount by sale of the land:

Held, that D, even although *bonâ fide* purchaser, could not resist the claim.

THE plaintiff, Sámi Náyakan, sued to recover Rs. 1,023-2-5, principal and interest due on two mortgage bonds for Rs 380 and Rs. 95, respectively, executed by Yellappa Náyakan (defendant No. 1) in 1876 and 1877.

Plaintiff alleged that on the 7th April 1880 he purchased certain land from Kandasámi Náyakan (defendant No. 2, brother-in-law of defendant No. 1) and handed over the said mortgage bonds to him as security for the unpaid purchase money and that Yellappa Náyakan and Kandasámi Náyakan had fraudulently sold the land mortgaged to Mutha Náyakan (defendant No. 3). Defendant No. 1 pleaded that he had discharged the first and had not executed the second bond. Defendant No. 2 denied having received the bonds. Defendant No. 3 alleged that on the 15th June 1881 he purchased the land mortgaged to plaintiff for Rs. 380 from defendant No. 1 (who handed to him plaintiff's mortgage bond for Rs. 380 alleging that it was discharged) and pleaded that he was a *bonâ fide* purchaser.

The District Múnsif of Coimbatore, T. Rámasámi Ayyangár,

* Second Appeal 390 of 1884.

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found that defendant No. 1 executed both the bonds; that defendant No. 2 received both bonds as alleged by the plaintiff, and that defendant No. 3 had conspired with defendants Nos. 1 and 2 to defraud the plaintiff, and held that, even if defendant No. 3 was a *boná fide* purchaser, plaintiff's mortgage being prior was not affected by the subsequent sale, and decreed for plaintiff.

On appeal by the defendants the District Judge of Coimbatore (H. Wigram) found that there was no evidence of any fraud on the part of defendant No. 3, but held that as defendant No. 2 had misappropriated the bond for Rs. 380 entrusted to him by plaintiff, defendant No. 1 could give no title to defendant No. 3.

Defendant No. 3 appealed to the High Court on the grounds, *inter alia*, that the plaintiff was guilty of gross negligence in entrusting the bond to defendant No. 2 and that his claim must yield to that of an innocent purchaser induced to purchase by such negligence.

Krishna Ayyar and *Krishna Ayyangár* for appellant.

Báláji Ráu for respondent.

The Court (Turner, C.J., and Hutchins, J.) delivered the following

JUDGMENT:—By a registered instrument dated on the 26th March 1876 the defendant No. 1 hypothecated his lands in Vilankurichi to the respondent. In April 1880 the respondent deposited his mortgage deed with defendant No. 2 by way of equitable mortgage to secure the unpaid balance of the purchase money in respect of a sale of land made to him by the defendant No. 2 and one Appu Náyak. The defendant No. 2, who is the brother-in-law of defendant No. 1, gave the plaintiff's mortgage deed to the defendant No. 1, who sold the mortgaged property to the appellant and handed to him the mortgage deed. The appellant pleaded that he purchased in good faith believing that the mortgage had been redeemed.

The mortgage deed is not endorsed as satisfied, but, assuming that the appellant purchased in the *boná fide* belief that it had been satisfied, we are not prepared to hold that the respondent has lost his priority. In the cases in which it has been held that a mortgagee is postponed to a subsequent purchaser in good faith because he has parted with his title deeds, something more has been shown than the mere parting with the deeds.

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MUTHA v. SÁMI.

Although the English Courts in the later cases—*Hunter* v. *Walters*,(1) *Briggs* v. *Jones*(2)—have held that if the inference of fraud be rebutted, the negligence may nevertheless be so gross as to create an equity in favour of a *boná fide* purchaser, slight negligence has not been considered sufficient to deprive an encumbrancer of his right.

The rule of equity is that a prior encumbrancer would not be postponed to a subsequent encumbrancer unless he has been guilty of gross negligence amounting to fraud in its qualified legal sense per Wood, V.C., in *Dowle* v. *Saunders*,(3) *Roberts* v. *Croft*,(4) *Somasundara Tambiran* v. *Sakkarai Pattan*.(5) Here it cannot be said that the respondent has been guilty of any negligence, and the only ground on which it could be held that he has lost his priority would be that he had, to some extent, put it in the power of the equitable mortgagee to commit a fraud.

This is what every one does who, in the course of business or for convenience, entrusts the possession of his property to another; nevertheless, where the transferee or depositary wrongfully assumes to create a larger title in a third party than he himself possesses the law ordinarily refuses to give effect to the transaction as against the true owner.

The appeal fails and must be dismissed with costs.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. December 19.

QUEEN-EMPRESS

against

KHÁSIM SAHIB.*

Arms Act, s. 19—*Unlicensed possession of gunpowder used for making crackers.*

The possession of gunpowder without a license, whether intended for the manufacture of fireworks or not, is an offence under s. 19 of the Indian Arms Act, 1878. *The Queen* v. *Suppi* (I.L.R., 5 Mad., 159) distinguished.

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(1) L.R. 7 Ch., App., 75.
(2) L.R. 10 Eq., 92.
(3) 34 L.J. Eq., 87.
(4) 27 L.J., Eq. 220.
(5) 4 M.H.C.R., 369.
* Criminal Appeal 412 of 1884.

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THIS was an appeal under s. 417 of the Code of Criminal Procedure from the judgment of W. F. Grahame, Sessions Judge of Cuddapah, dated 18th August 1884, reversing on appeal a conviction under s. 19 of the Indian Arms Act, 1878, by the Sub-divisional First-class Magistrate of Cuddapah.

QUEEN EMPRESS *v.* KHÁSIM.

The facts of the case appear from the judgment of the Sessions Court, which was as follows:—

"The appellant was convicted by the Deputy Magistrate under s. 19 of the Arms Act of a breach of the law in having in his possession ten seers of gunpowder and in having sold fireworks to the manager of a temple, and was sentenced to two months' rigorous imprisonment which he has undergone. In the face of the finding recorded in the *Queen* v. *Suppi* (1) that conviction is wrong. The High Court have ruled in that finding that 'the manufacture or possession of fireworks without a license is not contrary to the Arms Act,' and the short heading to the report is 'Gunpowder and rockets for fireworks not ammunition.' If gunpowder for fireworks be not ammunition, its possession without a license is not a contravention of the Arms Act. The finding and conviction were therefore wrong and are hereby reversed. As the defendant has suffered his imprisonment and been released, I can do no more than express regret that the ruling of the High Court was not brought to the notice of the Deputy Magistrate, and suggest that it be published in the District Gazette."

The Government Pleader (Mr. *Shephard*) in support of the appeal.

Prisoner was not represented.

The judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.) was delivered by

TURNER, C.J.—In this case Khásim Sahib received from the trustees of a temple an advance of Rs. 40 to get ready some fireworks for display during a procession of the idol. He accordingly procured some powder from a license-holder and made up the fireworks and supplied them to the temple. The attention of the authorities having been aroused by the display of fireworks, inquiry was made, and it was discovered that Khásim Sahib was the manufacturer. As he had not obtained a license under the Arms Act, he was prosecuted for the offence of keeping ammunition and was

(1) I.L.R., 5 Mad., 159.

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QUEEN EMPRESS v. KHÁSIM.

sentenced to undergo rigorous imprisonment for two months. He appealed to the Sessions Judge. There was considerable delay in the disposal of the appeal, and the sentence had expired when the Sessions Judge pronounced the conviction illegal, inferring that it was so from a ruling of this Court in the *Queen* v. *Suppi*. (1) The term "ammunition" is defined by the Arms Act as meaning, among other things, any explosive material. Read in combination with the terms "Arms and military stores," it is not unreasonable to infer that the intention of the Act was to deal with an explosive material capable of being used for purposes of warfare. No doubt powder may be so used, and a person who possesses a quantity of powder without a license is, in our judgment, liable to conviction, although he may intend to employ the powder in the manufacture of fireworks or other harmless purpose. What the Court ruled, whether rightly or wrongly, in the case referred to was that, if the powder when it came to the possession of a person charged under the Act had been actually made up into fireworks, an offence would not be committed. It would seem unreasonable that a child found in the possession of a cracker without a license should be taken to have committed an offence under the Act. The provision of the law has no doubt been wisely devised for the preservation of the peace and tranquillity and for the protection of the public from danger, and we are bound to follow the terms of the law when those terms are clear; but it is a law which should be applied with considerable discretion, and seeing that the object which the accused had in the possession of the powder was an innocent one, and that his offence in reality consisted in his omission to take out a license, we are bound to say, we think, he would have been better punished with a fine rather than with imprisonment. We must, however, observe that the Magistrate was aware that the accused had previously held a license, that he had failed to take one out for the current year, and had been warned of his default.

We set aside the order of the Judge acquitting the accused, and we confirm the conviction. No further orders are necessary as the imprisonment to which the accused had been sentenced has been already undergone.

(1) I.L.R., 5 Mad., 59.

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ORIGINAL CIVIL.

Before Mr. Justice Brandt.

EVERET
and
FRERE.

1885.
January 30.

14 Bom. 541.
25 Bom. 177.
29 Mad. 276.

Civil Procedure Code, s. 648—*Residence—Arrest before judgment.*

Where an officer proceeding from Burma to England on leave resided a few days in Madras on the way:

Held, that such residence was sufficient, for the purpose of s. 648 of the Code of Civil Procedure, to render him liable to arrest before judgment.

THIS was a motion before Brandt, J., to order execution of a warrant of arrest before judgment, issued under s. 478 of the Code of Civil Procedure at the instance of the plaintiff in Small Cause Suit 13 of 1885 in the Court of the Subordinate Judge of the Nílgiris, and sent to the High Court for execution under s. 648 of the said Code.

Mr. *Norton*, for plaintiff, referred to ss. 17, 37, 380 of the Code of Civil Procedure, and, in addition to the cases cited in the judgment, to *Rámchandrá Sakhárám* v. *Keshav Durgáji,*(1) and to Morton's decisions (Bengal), pages 148, 149, 160, and contended further that, the functions of the Court under s. 648 being purely ministerial, the Court had no discretion but was bound to execute the warrant.

Defendant was not represented.

The facts appear from the judgment :—

BRANDT, J.—I am of opinion that the arrest of the defendant in Civil Suit 13 of 1885 on the file of the Court of the Subordinate Judge, Nílgiris, on the Small Cause side, upon the warrant issued by that Court under s. 478 of the Code of Civil Procedure for arrest before judgment, and sent to this Court under s. 648, must be and it is ordered.

The facts of this case, so far as the Court is informed, are, that

(1) I.L.R., 6 Bom., 101.

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EVERET v. FRERE.

the plaintiff has filed a suit in the Ootacamund Court of Small Causes against the defendant, Captain Frere, an Officer of Her Majesty's 21st Fusiliers, for rent; that the defendant was at the time when the suit was instituted with his regiment at Thayetmyo in British Burma, and that he is now on his way to England from Burma on leave, and is, and has been for some days, living within the limits of the ordinary civil jurisdiction of this Court. And the papers sent to this Court show that the Judge of the Court of Small Causes, Ootacamund, has satisfied himself that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant. Upon this the said Subordinate Judge has issued a warrant to arrest the defendant and bring him before the said Court to show cause why he should not furnish security for his appearance.

The question as to which I entertained doubt was as to whether the defendant can be properly held to "reside" at the present time within the jurisdiction of this Court for the purposes of s. 648.

The word is used in several sections of the Act, noticeably in s. 17, s. 380, and that now under consideration.

In section 17 the words are "actually and voluntarily resides;" in section 380 the words are "is or are residing out of British India." In the former Act the word used was "dwell." As observed by the learned Chief Justice of the Bombay High Court in *Mahomed Shuffli* v. *Laldin Abdula*(1) little or no distinction can be drawn between the two words and the meaning implied in them. If any distinction can be drawn it would appear that "dwell" has a more extended signification than "reside," *Emritloll* v. *Kidd.*(2) It has further been pointed out, and with reason, that regard must be had to the meaning to be assigned to the word in the connection in which it occurs and the intent of the special provision of the Code in which it is used: and the absence in section 648 of the words "actually and voluntarily" used in section 17 is not without significance. Bare "residence" then is clearly sufficient under section 648. In the case of *Morris* v. *Baumgarten*(3) it was held that an officer who was in Calcutta

(1) I.L.R., 3 Bom., 227. (2) 2 Hyde, 117. (3) Coryton, 152.

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for a month only for the purpose of attending race meetings, having no permanent residence elsewhere "dwelt" in Calcutta for the purposes of the Act. The case of *Alexander* v. *Jones*(1) cited by the learned Counsel for the plaintiff is a very strong case. There it was held that a gentleman who had at the time no permanent residence, except that he was staying with a brother-in-law as a guest, must be taken to dwell at the place where he was then abiding, "though such an abode might not constitute a dwelling if he had retained a permanent residence." In the case before me there is nothing to show that the defendant has at the present moment any permanent residence, and I must hold that for the purpose of this application he is at present "residing" within the limits of the ordinary civil jurisdiction of this Court.

EVERETT v. FRERE.

Solicitor for plaintiff—*Wilson.*

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

JANAKI, PETITIONER,

and

KESAVALU, RESPONDENT.*

1884. November 28.

17 mad. 379

19 Cal. 42

31 mad. 28.

48 Cal 817

Limitation Act, sch. II, art. 178—Application for certificate to collect debts of deceased person.

Article 178 of schedule II of the Indian Limitation Act, 1877, does not affect an application under Act XXVII of 1860 for a certificate to collect debts due to the estate of a deceased person.

THIS was an application under section 622 of the Code of Civil Procedure praying the High Court to set aside an order of J. H. Nelson, District Judge of Chingleput, dated 11th January 1884, rejecting a petition by Janaki Ammál for a certificate under Act XXVII of 1860 to enable her to collect a debt of Rs. 800 due on a mortgage bond executed to her sister Mangammál who died at Madras in 1875.

The application was opposed by Kesavalu Náyudu, who claimed

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(1) L.R., 1 Ex., 133.

* Civil Revision Petition 168 of 1884.

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JANAKI v. KESAVALU.

to be the sole heir of the deceased, on the ground that it was barred by lapse of time.

The District Judge held that, as the application was made after three years from the death of Mangammál, it was barred by article 178 of schedule II of the Indian Limitation Act, 1877.

Visvanátha Ayyar for petitioner.

Respondent was not represented.

It was contended for petitioner that article 178 of schedule II of the Limitation Act did not apply to the case.

The judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.) was delivered by

TURNER, C.J.—It is argued that no other applications except in *suits* are dealt with by the Act. If we were to hold that article 178 applies to all applications for which no period of limitation is provided, it would lead to most inconvenient results. Such a limitation could not have been intended to apply to an application for probate, an application under the Religious Endowments Act, an application for the appointment of new trustees, &c.

Hence we feel ourselves at liberty to follow the rulings in *In re Ishan Chunder Roy*(1) and *Bái Mánekbái* v. *Mánekji Kávasji*(2) at least so far as to hold that article 178 does not apply to applications for certificates to collect debts. The order of the Judge is set aside and the case remanded that he may pass a fresh order. Costs will abide and follow the result.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1885. January, 6.

10 Mad. 316.

VÍRARÁGAVAMMA AND OTHERS (DEFENDANTS), APPELLANTS, and SAMUDRALA (PLAINTIFF), RESPONDENT.*

Hindú law—Debt binding on family—Suit against one of two undivided brothers—Personal decree—Attachment of family property—Effect of decree.

The creditor of a joint Hindú family, consisting of two brothers, sued the elder brother only (the younger being a minor) to recover a debt binding on both

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(1) I.L.R., 6 Cal., 707. (2) I.L.R., 7 Bom., 213.

* Appeal 94 of 1884.

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brothers, and, having obtained a decree for the payment of the debt, attached the family property.

VI'RARÁGA-VAMMA v. SAMUDRALA.

In a suit by the younger brother to set aside the attachment *quoad* his share in the property attached:

Held, that, inasmuch as the decree was not passed against the elder brother as manager of the family, the younger brother's suit must prevail.

Bissessur Lall Sahoo v. *Maharajah Luchmessur Singh* (L.R. 6 I.A., 233) distinguished.

SUIT No. 6 of 1882 in the District Court of Kistna was brought by Pillarisetti Samudrala Náyudu to establish his right to a half share (1) in certain lands, (2) in a lease of certain villages, and (3) in certain warehouses and house-sites in the town of Masulipatam. The plaintiff alleged that the defendant, Chandu Virasámi Náyudu, brought suit 10 of 1875 on the file of the late Subordinate Court against Venkatáchalam, the elder brother of plaintiff (who was then a minor), and obtained a personal decree against him, and that, in execution of this decree, the property mentioned in the plaint was attached. Plaintiff prayed for a decree establishing his right and setting aside the attachment in suit No. 10 of 1875. The defendant having died, his widow, Víraragavamma, defended the suit and pleaded, *inter alia*, that the debt for which the decree was obtained in suit 10 of 1875 was originally contracted by the plaintiff's father, and Venkatáchalam merely renewed the bond executed by the father, and that, as Venkatáchalam was the manager of the family, the whole family property was liable to be sold under that decree.

Upon this part of the case the judgment of the District Judge, W. J. H. LeFanu, was as follows :—

" I now come to the real question in issue in this case ; I have no doubt whatever that the decree in suit No. 10 of 1875 was intended to be passed against the plaintiff's brother in his capacity of managing member of the family. The Subordinate Judge does not say so, and I think that a sufficient reason has been given. Suits Nos. 7 and 10 of 1875 were filed against the plaintiff's elder brother to recover from him debts incurred by his father and for which he had made himself responsible by renewal of the obligations in his own name. In suit No. 7 of 1875 it was distinctly ruled by the Subordinate Judge that it was not necessary to make the defendant's minor brother, the plaintiff in the present suit, a defendant, because the defendant (the elder brother of the

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plaintiff in the present suit) was the managing member of the family. Suit No. 10 of 1875 was filed after the disposal of 7 of 1875, and by the same vakíl who had conducted that suit. He no doubt omitted the name of the present plaintiff from the list of defendants in consequence of the ruling of the Subordinate Judge above referred to in 7 of 1875. I think it is to be regretted that this omission took place, for it obliges me to decide this case in accordance with what I humbly conceive to be the law, but which seems to me to be wholly inconsistent with equity. I should, however, add that it is not only this omission, but also the decision in second appeal No. 135 of 1879 on the file of the High Court of Madras which has guided me to the conclusions which I shall proceed to enunciate.

"I shall now give briefly the events which led to the present suit. The plaintiff's father, Rághava Náyudu, was a dealer in cloth, and appears also to have been engaged in the leasing of villages, and the operations of borrowing and lending which form part of a sowcar's business. He executed exhibit IV to the first defendant in this suit on the 31st July 1869 for a sum of Rs. 3,200. There has been an attempt on the part of the plaintiff to get behind this transaction, but, I consider, that it is sufficiently evidenced by the decision in suit No. 10 of 1875 above alluded to. For my own personal satisfaction, I have gone into the transaction and have satisfied myself that it was a proper transaction, and that, even on equitable grounds, there is no reason for wishing to get behind it. After Rághava Náyudu died, his son, Venkatáchalam Náyudu, the elder brother of plaintiff, executed exhibit III to the first defendant. This was the suit document in Original Suit 10 of 1875 on the file of the Subordinate Court. This exhibit was executed by the plaintiff's elder brother as the 'eldest son' and 'varsu' (heir) of the late Rághava Náyudu. First defendant got a decree on this exhibit and sued out execution on it, in the course of which the property, which forms the subject of the present suit, was purchased in court-sale by the defendants 1 to 6. The plaintiff now comes forward and alleges that the obligor of exhibit III was not the managing member of the family, that the decree in 10 of 1875 was not passed against the said obligor in his capacity of managing member, and that, even if it was, it is not binding on the plaintiff.

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VI'RARÁGA-VAMMA v. SAMUDRALA.

"Morally speaking, I have no doubt that the decree in Original Suit 10 of 1875 was intended to be passed against the defendant in that case in his capacity of managing member of the plaintiff's family; but it was not so stated in that case, the Subordinate Judge no doubt thinking that in the recently decided case 7 of 1875, the question of plaintiff's brother being the managing member had been sufficiently decided. The omission, as also that of making the present plaintiff a defendant in that suit, is to be regretted, as the result is not, I think, equitable, though I have no doubt that it is in accordance with the latest rulings governing the case.

"I had at first thought that I would be able to dispose of this case in favour of the defendants, which would have been what I think the equity of the case requires; but I find on further consideration that this course is not open to me. The tendency of latter decisions has been to whittle away the equity of *Ponnappa Pillai's case*(1) and surround the rule, which makes ancestral property in the hands of sons liable for debts incurred by fathers for purposes other than illegal and immoral, with restrictions which enable the sons to throw difficulties in the way of creditors who seek to make assets of the father's estate in the sons' hands liable for his debts. I have been referred, on behalf of the defendants, to *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*,(2) *Jumoona Persad Singh* v. *Dig Narain Singh*,(3) and *Subbáyyan* v. *Nágasámi*.(4) The two latter do not help the defendants, for they are not on all fours with the present case. In the last-mentioned case the decree had been passed against the father on his own admission of the debt; in the Calcutta case the distinction was drawn between a son sued 'as representing the joint family' and one sued in his individual capacity. It must be admitted that the first defendant did not expressly sue the plaintiff's brother as the representative of the family. The case cited in the Indian Appeals seems to me to come nearer to what I would term the equity of the present case. In that case the Privy Council dealt first with the case of minors sued expressly through their guardian; there subsequently arose a question as to whether a decree which

(1) I.L.R., 4 Mad., 1.
(2) L.R., 6 I.A., 233.
(3) I.L.R., 10 Cal., 1.
(4) I.L.R., 6 Mad., 155.

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VÍRARÁGA-VAMMA. v. SAMUDRALA.

did not expressly purport to be passed against the representative of the family in respect of a joint debt could be executed against the joint property of the family. In that case I have not facts enough in the report to enable me to say how far the cases tally, but it seems to me that the circumstances of the first defendant's decree in the present case might, if this precedent was the only one on which I had to form a judgment, be brought within the lines of the Privy Council's ruling; for their Lordships held that, though certain decrees were drawn up with informality, still looking at the substance of the case, they might be held to be decrees against the representative of the family in respect of a family debt and might be properly executed against the joint property of the family. This decision was passed in 1879; and I have been much exercised as to whether I would not be justified in importing the equitable doctrine which this decision contains to govern the present case. I think, however, that it is not the duty of the Mufassal Courts to import equitable doctrines to guide them in their decisions where there are the distinct rulings of the law pointing in another direction laid down in later decisions of their own High Courts, and I have no doubt that the present case is governed by the decision in *Subramanian* v. *Subramanian*.(1) In that which was a Full Bench case the Chief Justice and another Judge were for modifying the harshness of law by an equitable provision that plaintiff, who sought to recover his share of family property against a mortgage sale purchaser, should, before recovering the share pay his share of his father's debt, but the Full Bench negatived even this compromise and gave plaintiff his share without making him discharge any part of the obligation. The cases are quite parallel, the only difference being that in the latter case the elder brother had executed a renewed mortgage in place of an old mortgage executed by his father, whereas in the present case it is a renewed promissory note. The High Court held that the omission to make the plaintiff, the younger brother, a party to the decree was fatal to the decree-holder's claim against the younger brother's share and that the decree must be held as personal against the mortgagor only. Following this decision, I hold that the omission in the present case to bind the plaintiff by the

(1) I.L.R., 5 Mad., 125.

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VI'RARÁGAVAMMA v. SAMUDRALA.

decision in Original Suit No. 10 of 1875 and to describe the plaintiff's brother in that suit as managing member of the family, is an objection which cannot be got over, and the plaintiff's claim to a half-share in the immovable property referred to in the plaint so far as it has been sold in execution of the decree in Original Suit No. 10 of 1875 on the file of the Subordinate Judge must be allowed. The first defendant will pay the plaintiff's costs and the defendants will bear their own costs."

Sundaram Sástri for appellants.

Anandácharlu for respondent.

The material portion of the Judgment of the High Court (Turner, C.J., and Muttusámi Ayyar, J.) was as follows :—

The second objection is that Original Suit 10 of 1875 was in reality a suit to recover a debt due by the father for which both brothers were liable, and it is argued that, although the decree is imperfect, on the authority of *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*(1) we are entitled to give effect to it as the decree was passed against the family. It is possible, nay probable, that the present respondent was not included in Original Suit 10 of 1875, because the Subordinate Judge had in Original Suit 7 of 1875 held that it was sufficient for a creditor to implead the managing member of the family only, and if we had felt ourselves at liberty to go beyond the decree we should have acceded to the contention of the appellant's pleader that the debt in respect of which Original Suit 10 of 1875 was brought was a family debt and binding on the respondent. Unfortunately the elder brother was not sued as manager and the decree was not drawn up as a decree to be executed against him in that character or to be satisfied out of the family property. For aught that appears on the face of the decree, relief was awarded to the plaintiff against the then defendant as for a purely personal liability. It is true that that liability is shown by the decree to have had its origin in the father's debt, but it would be consistent with the decree that the then defendant had been impleaded because he, and he alone, had taken assets, and, as we have observed, there is nothing on the face of the decree to show that the claim was made or relief awarded against the then defendant either in his representative character or as manager of the family. This appears to distinguish the present

(1) L.R., 6 I.A., 233.

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VI'RARÁGA-VAMMA v. SAMUDRALA.

case from the case cited. In each of the decrees mentioned in *Bissessur Lall Sahoo's* case there was an express direction that the debts should be recovered not from the property of the judgment-debtors, but from the family property and this direction respecting the fund from which satisfaction should be obtained sufficiently indicated that the persons impleaded as defendants had been sued in a representative character. We are unable to distinguish the present case from those cases in which the Privy Council has held that a mere money decree obtained against one member of a coparcenery family will not justify execution against the interests of all the members of the family.

We must affirm the decree of the Court of First Instance, but looking to the circumstance that the defect in the proceedings was in all probability occasioned by the plea taken on behalf of the respondent in Original Suit No. 7 of 1875, we shall direct each party to bear their own costs of this appeal.

The decree of the Court of First Instance is affirmed.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. October 28. December 8.

NÁRÁYANA (DEFENDANT), APPELLANT,

and

KRISHNA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

15 Bom. 177.
2 C.W.N. 199.
24 Mad. ...
25 do. 26.
4 All. 72.
2 C.L.J. 173
... C.W.N. 205
8 Cal 473.
... Mad 483
... L.J. 201

Hindú law—Partition suit—Joint property—Stridhanam—Presumption—Procedure—Suit by grandson against uncle in lifetime of grandfather, alleged to be imbecile—Death of grandfather before trial—Objection to suit on appeal disallowed—Civil Procedure Code, s. 561—Objections to decree in formâ pauperis *disallowed.*

K sued N, his uncle, for partition of the estate of V, the father of N, in the lifetime of V, who was alleged to be of unsound mind. N objected to the suit being entertained on the ground that V was alive. Before issues were settled V died and the suit was tried and K obtained a decree.

On appeal by N on the ground that, when the plaint was filed, K had no cause of action:

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* Appeal 34 of 1884.

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28 All. 541
28 Cal. 131
39 C. L. J. 140

NÁRÁYANA
v.
KRISHNA.

Held, that the decree could not on this ground be set aside.

Objections by a respondent to a decree under s. 561 of the Code of Civil Procedure cannot be filed *in formâ pauperis*—*Bábáji Hari* v. *Rájáram Ballál* (I.L.R., 1 Bom. 75) followed.

When property stands in the name of a female member of a joint Hindú family there is no presumption that such property is the common property of the family.

THIS was an appeal from the decree of L. A. Campbell, District Judge of Nellore, dated 26th October 1883, in suit No. 6 of 1882.

The plaintiffs, Vemuganti Krishna Ráu and Rámá Ráu, minors, by their mother Sundaraboyammá, sued to recover Rs. 20,000 from the defendant Vemuganti Náráyana Ráu, being a moiety of the joint family property in possession of the defendant, the paternal uncle of the plaintiffs. In the plaint it was alleged that the defendant's father Venkata Ráu was old and of unsound mind, and that the defendant had taken possession of all the family property, turned the plaintiffs out of the family house, and was wasting the movable property. It was also alleged that the defendant had secreted property and that plaintiffs were unable to estimate the value of the whole family property, and that if the claim was under-rated further stamp duty would be paid. The plaint was filed on the 13th February 1882.

On the 5th April 1882 the defendant filed a written statement in which he pleaded, *inter alia*, that the plaintiffs had no right to sue in the lifetime of their grandfather Venkata Ráu, and that, even if plaintiffs had a right to sue, they were not entitled to a moiety of the estate. Before issues were settled Venkata Ráu died. No issue was raised as to whether the plaint disclosed any cause of action, nor was the plaint amended.

The District Judge gave the plaintiffs a decree for Rs. 10,563-10-10.

The defendant appealed, *inter alia*, on the ground that, as the property was the self-acquisition of Venkata Ráu, who was alive when the suit was brought, the suit ought to have been dismissed, and that the subsequent death of Venkata Ráu could not cure the defect.

The plaintiffs filed objections to the decree claiming property to the extent of Rs. 20,000 in excess of the amount decreed by the District Court.

These objections were allowed to be filed without payment of stamp duty, subject to any objection which might be taken at the

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NÁRÁYANA v. KRISHNA.

hearing of the appeal, upon proof that the plaintiffs were unable to pay stamp duty, the defendant having obtained an *ex parte* order from the High Court staying execution of the decree pending appeal.

Mr. *Branson* and *Rámáchandra Ráu Saheb* for appellant.

Mr. *Wedderburn* for respondents.

At the hearing, the Court having confirmed the Lower Court's decree except as to a sum of Rs. 505 which were allowed to the appellant on account of funeral expenses, objection was taken to the hearing of the respondents' claim on the ground that objections *in formâ pauperis* could not be filed under the provisions of the Code of Civil Procedure—*Bábáji Hari* v. *Rájáram Ballál.*(1)

For the respondents it was contended that, inasmuch as it was by the *ex parte* order of the Court issued at the request of the appellant, upon grounds since shown to be insufficient, that the respondents had been prevented from realizing the decree and so obtaining funds sufficient to enable them to pay the stamp duty on their memorandum of objections, the respondents ought to be allowed to pay the stamp duty *nunc pro tunc.*

The further facts and arguments necessary for the purpose of this report appear from the judgment which was delivered by

TURNER, C.J.—This suit was instituted by Sundaraboyammá, the mother and guardian of the two minor sons of Vasudeva Ráu, against Náráyana Ráu, the brother of Vasudeva Ráu, claiming on behalf of the minors a partition of the family property.

It was alleged in the plaint that Venkata Ráu, the grandfather of the minors, was old and of unsound mind, and that the appellant had taken possession of all the property; that he had refused to maintain the minors, had turned them out of the house, and was wasting the estate; that in January 1881 the guardian of the minors had called upon him to make a division of the property, but that he had refused it.

Venkata Ráu was not made a party to the suit.

Although the Procedure Code contains no provision for the representation of persons of unsound mind, unless they have been adjudged to be so under Act XXV of 1858, or under some other law for the time being in force, a Court ought not to entertain a

(1) I.L.R., 1 Bom., 75.

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suit for the disposition of the property of a person of unsound mind until he is duly represented. The course which it is incumbent on the party desiring to institute proceedings for the administration of the estate of a person of unsound mind to take is to apply first that the person of unsound mind may be adjudged to be so and then to make him a party to the suit represented by a curator appointed under the Act.

In this suit, however, before the Court had settled issues Venkata Ráu had died: and the suit then proceeded as it would have proceeded had the proper persons been originally made parties and had the suggestion been placed on the record that Venkata Ráu had died; under these circumstances, although we consider that the plaint as framed should have been returned for amendment before the death of Venkata Ráu on the ground that all proper persons were not made parties, we are not prepared to set aside the proceedings, seeing that when the trial commenced the relief which was sought was such as could be granted on the facts then appearing on the record.

[After disposing of the other questions raised by the appeal the judgment proceeded as follows:—]

We agree with the decision of Mr. Justice West in *Bábáji Hari v. Rájáram Ballál*(1) that the Civil Procedure Code does not provide for the admission of objections, even when preferred by a pauper, without payment of Court fees. We can hardly believe that this omission was intentional, but the language of the provisions relating to the admission of appeals on the part of paupers is so precise that we do not feel justified in applying it to the case of a pauper presenting objections. It would have been open to the respondents to have presented a pauper appeal in this case if they had desired to contest any part of the decree of the Court of First Instance which was unfavourable to them. It is explained that they had no desire to avoid payment of the Court fees, and they were preparing themselves by using diligence to execute their decree, to collect a sum which would have sufficed to pay the stamp on their objections if an appeal were preferred. An *ex parte* order was, however, obtained by the appellant, restraining the respondents from executing the decree, and they have thus been

(1) I.L.R., 1 Bom., 75.

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unable to provide themselves with funds for payment of stamp duty.

We shall now discharge the order staying execution and allow the respondents three weeks to file the stamp on their memorandum of objections.

[The above order having been complied with, the objections raised by the respondents were heard on the 8th December. The first objection related to a sum of Rs. 12,000 in Government promissory notes standing in the name of the deceased mother of appellant. The respondents claimed a moiety thereof on the ground that there was no evidence that the money was stridhanam, and that the legal presumption was that it was joint family property. Mayne's Hindú Law, s. 261, s. 262. *Sreemutty Chunder Monee Dossee* v. *Joykissen Sircar*.(1) Upon this question the judgment of the Court was as follows:—]

There is not, so far as we are aware, any case in which it has been held that, where property stands in the name of a female member of a Hindú family, it is to be presumed that it is the common property of the family, and that it is incumbent on a person who asserts that it is the property of the lady in whose name it stands to prove it. Nor is there any ground on which such a presumption could be founded.

Where a family lives in co-parcenary, the presumption which exists in the case of male members arises from the circumstance that they are co-parceners. On the other hand, the ladies are not in an undivided family co-parceners; whatever property they acquire by inheritance or gift is their separate estate, and, although it is not unusual for property to be transferred to the name of a female member to protect it from the creditors of the male members or to place it beyond the risk of extravagance on the part of the male members, such dealings are exceptional and can afford no ground for a general presumption.

With regard to the promissory notes which form the subject of the first ground of objection, all that is proved is that, many years before the appellant's father died, notes were bought in the name of the father on which he drew the interest and other notes in the name of the mother on which she drew the interest. It is not shown out of what funds these notes were purchased, probably

(1) 1 W.R., 107.

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it was with funds acquired by the father; but if it be so, the presumption is that he intended that the notes transferred to his wife should become her property, and this presumption would be confirmed if it is found that in the lifetime of her husband in the presence of sons jealously watching dispositions of the family wealth she is allowed to deal unchallenged with the property standing in her name.

That the appellant's mother had separate property and dealt with property as such to the knowledge of the family is shown by exhibit A in which she professes to dispose of no less than Rs. 5,000 and still to have a surplus of property which would descend to her sons. It is not shown that there was any property with which she had power to deal other than the notes which stood in her name, and it appears to us the Judge was justified in finding that this property was her separate property which, if it was of such a nature that it descended to sons, would have descended to the appellant as son to the exclusion of the respondents as grandsons.

We disallow the objections, and with regard to the whole costs of this suit, we direct that each party bear his own costs in both Courts.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. November 20 and 21.

SRI RÁJÁ RÁU VENKATA MAHIPATI GANGÁDHARA RÁMÁ RÁU, RA'JA' OF PITTAPU'R, (PLAINTIFF),

and

SRI RÁJÁ RÁU BUCHI SI'TAYYA AND OTHERS (DEFENDANTS).

[*On appeal from the High Court at Madras.*]

14 Bom. 26.
27 All. 43.
37 Mad 70
43 Cal 6

Res judicata—Act X *of* 1877, *s.* 13—*Estoppel—Privity in estate—Costs of inserting irrelevant matter in the printed record.*

A competent Court having decided upon an issue directly raised in a suit brought by a person alleging himself to have been adopted, that this adoption had not taken place, it was *held*, that the present suit was barred under Act X of 1877,

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Present: LORD FITZGERALD, SIR B. PEACOCK, SIR R. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

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57 Cal. 266

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section 13, as *res judicata*, having been brought by the son of the defendant in the former suit, claiming through his father, to establish the same adoption; and that the section applied, although the suits related to different properties. The establishment of the adoption alleged in the first suit would have obliged the father of the present plaintiff to share with the adopted son his ancestral estate. That adoption having been negatived, the son, in this suit, ought to be estopped from making title on the ground that the adoption had placed the person, from whom he claimed to inherit, in the relation of father's brother to him.

Where irrelevant matter had been introduced into the record, the Registrar was directed to tax the costs as if the record had not contained what he might consider to have been inserted unnecessarily.

APPEAL from a decree (1st December 1880) of the High Court of Madras, affirming a decree (18th August 1879) of the Subordinate Judge of Cocanada.

The suit, for a declaratory decree, out of which this appeal arose, was brought by the appellant the Rájá of Pittapúr, to establish his right as reversionary heir to the Kirlampúdi zamíndárí, expectant upon the decease of Buchi Sítayya, the first respondent, who was mother of the last male inheritor, Surya Ráu, a minor, deceased, without issue, in 1860. These latter were the widow and minor son of Buchi Tamayya, the owner of the zamíndárí, who died in 1857, leaving besides them two daughters who were co-defendants in the suit, and respondents with their mother in this appeal.

On the death of the boy, Surya Ráu, in 1860, his mother, Buchi Sítayya, as a Hindú widow, was placed in possession of the estate of Kirlampúdi, and in January 1870, in a petition to the Collector of Godávari, she stated that, in consideration of money lent to her by her two daughters to pay her late husband's debts, she had arranged to assign to them each a one-third share of the estate; asking the Collector, accordingly, to register their names as co-proprietors. This entry having been made, the Rájá of Pittapúr brought the present suit, alleging the adoption of Buchi Tamayya by Rájá Niladri Ráu, his (the Rájá's) grandfather; and he, claiming to treat the entry of the widow's daughters' names as an alienation beyond her powers, sought a declaratory decree, on the ground of his title to the reversionary estate in Kirlampúdi, expectant on the widow's death. The Rájá's claim thus depended on his establishing that Buchi Tamayya had been adopted by Niladri Ráu. It having been decided, as between Buchi Tamayya and the father of the present appellant, that no such adoption had

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taken place, the question was whether this suit was barred, under section 13 of Act X of 1877, as *res judicata*.

At the hearing, before the District Judge, it appeared that the adoption was alleged to have taken place in 1807, while Niladri was childless, and that, after some previous litigation, the matter of the adoption was brought forward on the death of Niladri Ráu, which occurred in 1828. In that year Buchi Tamayya filed his plaint in the Provincial Court of Masulipatam against Venkata Surya, the son of Rájá Niladri Ráu, and the Collector of Rájamandri, claiming possession of the zamíndárí of Pittapúr. He rested his claim upon the adoption, and also upon a testamentary disposition in his favour.

On the 14th September 1840, the Provincial Court dismissed the claim, being of opinion that neither the adoption nor any will had been established by the evidence.

On the 10th July 1842, Buchi Tamayya filed a rázináma petition in the Provincial Court of Appeal, which recited the decree of the 14th September 1840, and the steps taken in order to prefer an appeal, and also stated an arrangement whereby, in lieu of the zamíndárí of Pittapúr, the sum of Rs. 30,000 was to be received by instalments, the plaintiff withdrawing his appeal. A petition agreeing to these terms was filed by Venkata Surya.

The District Judge, on the above, decided that the present suit was barred as *res judicata*, there being, in his opinion, no foundation for the plaintiff's contention that the subsequent rázinámas had got rid of the effect of the judgment of 14th September 1840.

On appeal, the High Court (Turner, C.J., and Forbes, J.) confirmed this decision, giving judgment as follows :—

On 18th August 1879 the plaintiff, appellant, the Rájá of Pittapúr, instituted the present suit in which he claims to dispute the interests created by the respondent, Sítayya, in favour of her daughters, on the ground that Buchi Tamayya was his adopted brother, and that he is therefore the next reversioner entitled to succeed to the estate of Surya Ráu on the determination of the interest of Sítayya, the mother of the last full owner.

The adoption of Buchi Tamayya by the appellant's father was denied by the respondents, who pleaded that the matter had been directly and substantially put in issue and finally determined

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by a Court of competent jurisdiction in a suit to which the father of the appellant and Buchi Tamayya were parties, and that the appellant was bound by that decision. This plea was allowed by the Court of First Instance and the suit dismissed. It appears that the grandfather of the appellant, Niladri Ráu, and his first wife lived on bad terms with one another, and in the result the lady left the Rájá's house and shortly afterwards instituted a suit, in 1820, claiming to obtain an award of maintenance for herself and for Buchi Tamayya, who, as she alleged, had been adopted by the Rájá. This suit was dismissed on the ground that the lady had not shown that her husband had refused to provide for her in his own house, and that she had no sufficient excuse for withdrawing from his protection, and that the object of the proceedings was to establish by a side wind that the defendant had adopted the first plaintiff, his wife's nephew, and made him his heir. In this suit the question of adoption might have been, but was not, decided, but subsequently a suit in 1828 was brought after the death of Niladri Ráu against Venkata Surya, admittedly his natural-born son, by Buchi Tamayya, in which Buchi Tamayya averred that he had been adopted by Niladri Ráu, and that Niladri Ráu had by testamentary and other instruments executed before and after the birth of his natural son conferred on him, Buchi Tamayya, as his adopted son, the ancestral zámíndárí of Pittapúr.

We have called for and examined the plaint filed in that suit, and it appears that Buchi Tamayya not only asserted that by virtue of the instruments on which he principally based his claim he was entitled to the estate of Pittapúr, but that independently of such instruments he was, as an adopted son, entitled to a provision.

A testamentary instrument executed before or after the birth of the natural-born son would not have been valid to defeat the succession of the natural-born son unless Buchi Tamayya had been adopted. The Provincial Court of the Northern Division held that the material point on which the suit hinged was the adoption of the then plaintiff, and after full investigation it found the adoption was not proved and dismissed the suit. Venkata Surya was the father of the present appellant. Buchi Tamayya took steps to present an appeal to the Sadr Court. For that

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purpose he made an application to the Provincial Court and thereupon Venkata Surya presented a petition that Buchi Tamayya might be required to furnish security for the costs of the appeal.

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While these proceedings were pending, the parties came to a compromise, whereby, in consideration of a sum of Rs. 30,000, Buchi Tamayya abandoned his claim and withdrew his appeal.

The original judgment thereupon became final, and in our judgment estopped all parties to the suit, and those claiming through or under them, from again asserting the fact of the adoption.

We therefore affirm the decree of the Court of First Instance and dismiss this appeal with costs.

On this appeal Mr. *J. D. Mayne* and Mr. *Frederick Laing* appeared for the appellant.

Mr. *R. V. Doyne* and Mr. *G. P. Johnstone* for the respondents.

For the appellant it was argued that the rule of *res judicata* under section 13 of the Code of Civil Procedure was inapplicable here. There was no identity of subject-matter in this suit and the former one of 1840, in which a different inheritance was claimed. Moreover, although parties might be bound by the decision of an issue, they were not bound by decisions on the points which formed the successive steps upon which the conclusion of the Court had been reached. The question as to the adoption was only part of the case disposed of in 1840.

Reference was made to *Outram* v. *Morewood*,(1) *Barrs* v. *Jackson*,(2) *Brunsden* v. *Humphrey*,(3) *Flitters* v. *Allfrey*.(4)

For the respondents it was argued that, as the issue was substantially the same in both the present and the former suits, viz., whether the adoption of Buchi Tamayya by Niladri Ráu had taken place or not, the decision of the Provincial Court in 1840 was conclusive on the point.

Tekait Doorga Persad Singh v. *Tekaitni Doorga Konwari*,(5) *Soorjomonee Dayee* v. *Suddanund Mohapatter*,(6) *Chinniya Mudali* v.

(1) 3 East, T.R., 346. (2) 2 Smith's L.C (8th ed.) 830.
(3) L.R., 11 Q.B. D., 712; reversed on appeal. See L.R., 14 Q.B. D., 141.
(4) L.R., 10. C.P., 39. (5) L.R. 5 I.A., 149.
(6) 12 B.L.R., 304.

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Venkatachella Pillai,(1) *Nuthoo Lall Chowdhry* v. *Shoukee Lall*,(2) were referred to.

Mr. *J. D. Mayne* replied.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—This is a suit brought by the appellant against the mother and sisters of Surya Ráu, deceased, and the object of the suit is to have it declared that the plaintiff is entitled as reversionary heir of Surya Ráu to certain property which he claims in the plaint. In consequence of Surya Ráu's having died without a son, the mother succeeded to his property and took a Hindú mother's estate therein, and she has conveyed the estate absolutely to her daughters, who are also made defendants. Surya Ráu was the son of Buchi Tamayya, and the plaintiff is the son of Venkata Surya. The plaintiff by his plaint claims as reversionary heir to the property left by the son of the first defendant, and now in her possession and enjoyment, and he also asks a declaration that the alienation of the property mentioned in the plaint which the first defendant has made in favour of the second and third defendants was made without any legal necessity or justifying cause, and is void and inoperative beyond the lifetime of the first defendant, and that the plaintiff is entitled as reversionary heir to the portions so alienated.

The case of the plaintiff is that Venkata Surya, the father of the plaintiff, was the brother of Buchi Tamayya, the father of Surya Ráu, the deceased, and he says he was the brother of Buchi Tamayya because Buchi Tamayya was adopted by Niladri Ráu, his father's father. The defendants contend that the plaintiff's father and Buchi Tamayya were no relations, and that the plaintiff is estopped from saying that Buchi Tamayya was his father's brother; that he was not his brother by birth, and that he has no right to say that he was his brother by adoption, because in a former suit between the father of the plaintiff and Buchi Tamayya it had been conclusively determined, upon an issue raised in a Court of competent jurisdiction, that Buchi Tamayya had not been adopted. Thereupon an issue was raised in the present suit, "whether the suit is barred by *res judicata*." The Courts below have both found that the suit is barred by *res judicata*, and the appellant now contends that the judgment of the High Court,

(1) 3 M.H.C.R., 320. (2) 10 B.L.R., 200.

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which affirmed the judgment of the first Court, ought to be reversed upon the ground that the suit is not so barred. One of the contentions of the learned counsel for the plaintiff is that although in the suit between Venkata Surya and Buchi Tamayya it had been found upon an issue raised between them that Buchi Tamayya was not the adopted son of Niladri Ráu, still he is not bound by it, because this suit does not relate to the property which is the subject of the present suit. It is true that the former suit did not relate to the same property as that which is the subject of the present suit; but the issue has been tried between them by a Court of competent jurisdiction whether Buchi Tamayya was adopted or not. In fact, the allegation of the plaintiff is substantially this: that Venkata Surya had a right to say that Buchi Tamayya was not adopted when the establishment of his adoption would have given him a right to participate in the property of Niladri Ráu to which Venkata Surya in the former suit claimed to be solely interested; but that the plaintiff, deriving title through his father Venkata Surya has a right to say that Buchi Tamayya was adopted when the fact of his adoption would entitle the plaintiff to inherit property as the reversionary heir of Tamayya's son. If ever there was a case in which the law of estoppel ought to apply, it appears to their Lordships that this is such a case.

It appears to their Lordships that the High Court was right in holding that the decision of the Provincial Court in 1840, upon an issue directly raised in a cause which they were competent to try, that Buchi Tamayya was not adopted, would have been conclusive against Venkata Surya, the father of the plaintiff, and is also conclusive against the plaintiff himself, who cannot make a title except through his father.

It was contended on the part of the plaintiff, by his learned counsel, that the cases do not establish that an estoppel is binding unless the suit relates to the same subject-matter, but it appears to their Lordships that the cases which have been referred to do not establish that position. In the case of *Outram* v. *Morewood*(1) the second action was not brought for the same subject-matter for which the first action had been brought. The first action was for

(1) 3, East, T.R., 346.

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damages sustained by the plaintiff in consequence of the wife of Morewood having entered upon certain mines and taken coal from them before she was married. The wife contended that she was entitled to those mines by virtue of a certain conveyance; but it was found by the Court that the wife was not entitled to the mines, and the Court gave damages against her. Another action was brought subsequently against Morewood, who had afterwards married the lady, for a second trespass committed by them upon the same mines, and the question then arose whether the finding in the first suit, with reference to the damages claimed in that suit, was binding upon the two defendants in respect to the damages claimed against them in the second suit. It was held that it was. There were two distinct claims. The damages claimed in the two actions were distinct; the trespasses were distinct, and yet it was held that the decision in the first case with regard to the damages claimed in the first case was binding in the second case as an estoppel, the matter having been conclusively tried between the plaintiff and the defendant's wife when a *femme sole* in the first case.

The case of *Barrs* v. *Jackson*(1) was also referred to, but there the subjects of the two suits were different. In that case it was held that a decision of an Ecclesiastical Court, holding that the plaintiff was a next-of-kin for the purpose of obtaining letters of administration, was binding in a suit brought in the Court of Chancery for the distribution of the estate. The Ecclesiastical Court decided that the plaintiff was a next-of-kin for the purpose of having administration and managing the property. Subsequently the question was raised in the Court of Chancery whether he was a next-of-kin for the purpose of taking a share of the property. Those were perfectly distinct claims. Yet it was held that inasmuch as the Ecclesiastical Court would have had concurrent jurisdiction with the Court of Chancery to try the question with respect to distribution, the decision of the Ecclesiastical Court between the same parties with reference to administration was binding upon the Court of Chancery with reference to distribution. The learned Vice-Chancellor Knight Bruce had held that it was not binding, but his decision was overruled by the Lord Chancellor, who held that it was binding.

(1) 2, Smith's L. C., 806.

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Certain remarks of the Vice-Chancellor Knight Bruce in that case have been referred to, but in their Lordships' opinion they are not applicable to the present case, inasmuch as it depends upon the construction of an Act of the Legislature of India. It may be as well to refer to the remarks which were made by their Lordships in the case of *Krishna Behari Roy* v. *Brojeswari Chowdranee*.(1) The question there was with regard to the construction of the expression "cause of action," in the 2nd section of Act VIII of 1859. That Act is not so extensive as the Act of 1877, because it merely declares that a second trial shall not take place upon a cause of action which has already been decided. The question arose as to what was the meaning of "cause of action" in that section, and it was there said: "Their Lordships are of opinion that the expression 'cause of action' cannot be taken in its literal and most restricted sense, but, however that may be, by the general law where a material issue has been tried and determined between the same parties in a proper suit and in a competent Court as to the status of one of them in relation to the other, it cannot in their opinion be tried again in another suit between them." The point here has been determined in the first suit. It was there determined that the plaintiff's father and Buchi Tamayya were not brothers, because it was found that Tamayya had not been adopted. In the present suit the plaintiff says the parties to the first suit were brothers, and the Courts below have held that he is estopped from saying that they were brothers because it was determined in the former suit that they were not brothers.

The Act which governs the present case is the Procedure Code of 1877, by section 13 of which Act it is enacted that "No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they, or any of them, claim, litigating under the same title." The issue which was tried in the former suit in this case was whether Buchi Tamayya was adopted by Niladri Ráu, and the issue which the plaintiff wishes to try in the present case is the same, whether Buchi Tamayya was the adopted son of Niladri Ráu.

Their Lordships are clearly of opinion that the issue which was

(1) L.R., 2 I. A, 285.

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tried in the former suit is the same as that which the plaintiff wished to be tried in this suit, and that the plaintiff is estopped from making the allegation which he attempts now to support.

It was contended further, that even if the decision on the issue in the former suit was an estoppel between the parties as to the fact of the adoption of Buchi Tamayya, still that estoppel has been got rid of by reason of an arrangement which was afterwards come to by the parties by a rázináma, of which there were two parts. Looking to those documents it appears to be clear that the object of them was not to get rid of the judgment which was passed in the Provincial Court, but, on the contrary, to maintain it. Buchi Tamayya was about to appeal against the decision of the Provincial Court to the Sadr Court, and thereupon Venkata Surya entered into this rázináma, by which he agreed that if Buchi Tamayya would withdraw his appeal Venkata Surya would pay him Rs. 30,000. It was further stipulated that if Venkata Surya should break that agreement and not pay the Rs. 30,000, Buchi Tamayya should be at liberty to apply to the Court to enforce the payment of the Rs. 30,000 in the same way as if Buchi Tamayya had obtained a judgment against Venkata Surya for the amount. But that did not get rid of the judgment of the Provincial Court, in which it was held that Buchi Tamayya was not the adopted son, and that he was not entitled to recover the property. It was a judgment intended to prevent Buchi Tamayya from proceeding with his appeal and to allow the judgment of the Provincial Court to remain in force. The decision, therefore, of the Provincial Court stands, and being an estoppel between the parties the rázináma does not prevent it from having the effect which would have been given to it if the rázináma had not been entered into.

Their Lordships are clearly of opinion that the High Court was right in affirming the decision of the Lower Court, and thereby holding that the plaintiff was barred by the finding of the Provincial Court in the suit between his father, Venkata Surya, and Buchi Tamayya. They will therefore humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss the appeal. The appellant must pay the costs of the appeal.

Their Lordships wish to make a remark with reference to the record which has been sent up. It appears that over 900 pages of the record have nothing to do with the question raised by the

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appeal. It is a great abuse for parties to bring before this tribunal a record with 900 pages of documents and figures, none of which have the least bearing upon the case. It does not appear that they were ever proved in the first Court or that they were ever referred to by that Court or by the High Court. The whole of them which were sent by the first Court to the High Court have been incorporated in the record which the High Court has sent up to the Judicial Committee for the purpose of determining this appeal. Their Lordships have frequently called attention to similar abuses, and a circular has been issued directing the High Courts not to send up documents or evidence which have no bearing upon the case. The expenses of this appeal must have been enormously increased by that portion of the record which has been unnecessarily sent up. Under these circumstances their Lordships, in order to prevent a repetition of such an abuse, think it right to direct that the Registrar, in taxing the costs, shall tax them in the same manner as if the record had not contained such parts as the Registrar may consider to have been unnecessarily and improperly introduced into it.

Solicitors for the appellant—*Frank Richardson & Sadleir.*

Solicitors for the respondents—*Burton, Yeates, Hart & Burton.*

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

13. C.L.J. 43

SHUNMUGAM AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

MOIDIN (DEFENDANT), RESPONDENT.*

1884. December 9

11 Mad. 103.
17 All. 203.
22 I.A. 34
34 Cal 305
15 Cwn 672

Civil Procedure Code, s. 503—Receiver, Appointment of, after decree—Limitation Act, s. 15—Injunction.

In a suit brought in 1880 by the widow of a deceased partner to wind up the partnership, the surviving partner was prohibited by the Court, at the instance of the plaintiff, from collecting debts due to the firm; but leave was given to apply for the recovery of debts which might become barred by limitation.

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* Appeal 74 of 1884.

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SHUNMUGAM v. MOIDIN.

After decree, on the application of the plaintiff, a receiver was appointed under s. 503 of the Code of Civil Procedure to collect outstanding debts for the purpose of executing the decree.

The receiver having sued in 1883 to recover a debt which was due to the firm in 1879, the suit was dismissed (1) on the ground that the appointment of a receiver after decree was *ultrà vires*; (2) because the debt was barred by limitation:

Held (1) that the appointment of the receiver was valid; (2) that under s. 15 of the Limitation Act the suit was not barred.

THIS was an appeal from the decree of E. N. Overbury, District Judge of Salem, in suit No. 13 of 1883.

The facts of the case appear from the judgment of the District Court, the material portion of which was as follows:—

"One Sevoloyammál, widow of Subbaráya Chetti, filed original suit 17 of 1880 on the 20th October against Appáji Chetti, who is second plaintiff in original suit 13 of 1883, and another, who were partners with her husband in trade at Salem. She prayed the Court to take the accounts of the firm, to realize its assets, and for an order directing Appáji Chetti to pay into Court any balance due by him. She also asked the Court to discharge the firm's debts and to distribute the surplus among the partners according to their respective shares.

"On the 29th October 1880 an injunction was issued at the instance of Sevoloyammál prohibiting the said Appáji Chetti and another from collecting outstanding debts and compelling the former to produce in Court all accounts, &c., relating to the partnership. These were duly produced and retained in Court. At Sevoloyammál's request a commission was appointed to examine the accounts, and then a second commission for the same purpose. On the final report being received the Court tried the suit and passed a decree on the 20th September 1882.

"The decree was 'that the sum of Rs. 47,863-12-6, being the amount due to, or in the hands of, the firm, be applied as follows:—

"1st. In payment of the debts due by the partnership, amounting in the whole to Rs. 4,737-7-9.

"2nd. In payment of the sum of Rs. 34,131-3-6 to the plaintiff as her husband's share of the partnership assets, including the amount of his capital Rs. 25,136-2-3.

"3rd. In payment of the sum of Rs. 8,995-1-3, being the residue due to the defendant as his share of his partnership assets.

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"And it is ordered accordingly that the plaintiff is entitled to recover the said sum of Rs. 34,131-3-6, and it is further ordered that the defendant do deliver to the plaintiff possession of the houses and lands specified below, and do pay her her costs in the suit as specified below.'

"Thereupon Sevoloyammál put in a petition for the execution of the decree. A portion of the decree was then executed. On the 25th November 1882 she put in petition No. 580 of 1882 to execute the remainder of the decree, praying also for the return of the books, accounts, &c. She again put in petition No. 29 of 1883 for a return of the books to which Appáji Chetti objected on the ground that the debts should be collected by both parties. After presenting another petition to the same effect, she put in miscellaneous petition No. 56 of 1883, requesting the Court to appoint a receiver under s. 503 of the Code of Civil Procedure on the ground that most of the debts could not be collected without resorting to law suits and that she being a female, was unable to conduct them.

"In compliance with her request Mr. Wilkinson appointed Shunmugam Pillai, who was nominated by her, as receiver. The receiver has, by virtue of that appointment, brought the present suit.

"The plaintiff alleges that he is the receiver appointed by this Court to realize the outstanding debts, &c., found due to the firm in original suit No. 17 of 1880. The defendant in this suit carried on extensive money dealings with the firm which ceased on the 29th November 1879. The mutual accounts were balanced from time to time and the sum due by defendant up to the 20th March 1880 is Rs. 8,925-5-0. This sum was not collected in consequence of the injunction issued in the said suit on the 29th October 1880, as well as in consequence of the Court holding custody of the books, &c., relating to the firm and which were only handed over to the plaintiff in March 1883. The defendant delaying payment of the above amount, this suit is brought to recover that debt with interest.

"The defendant, among other pleas, contends that the appointment of the plaintiff as receiver was *ultrá vires*, hence this suit is unsustainable; it is also barred by limitation, and that the above injunction will not prevent this suit from being barred.

"Mr. *Pritchard*, counsel for defendant, contended that the appointment of a receiver was *ultrá vires* under s. 503 of the Code

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of Civil Procedure, as the property ceased to be the "subject of a suit" after the final decree was passed in original suit 17 of 1880, and relied on certain authorities for his contention (Collett on Specific Relief Act, s. 44. Collett on Injunction, pp. 198, 200).

"The plaintiff's vakil supported the appointment of receiver on the ground that the books, accounts, &c., were virtually under attachment of this Court.

"I have no doubt whatever that s. 503 refers only to the appointment of a receiver *during the pendency* of a suit. It seems to me that this Court should have in its order to the commissioner, appointed a receiver also, to collect all outstandings due to the firm. His duties might have continued after decree until final adjustment. As it is the decree does not provide for the realisation of the debts. Hence the plaintiff found a difficulty in executing it, and so applied for a receiver. In this the plaintiff erred. She or the other parties to the decree should have asked for a review of this Court's judgment or appealed to the High Court. To appoint a receiver after a final decree is passed is opposed to the spirit of the s. 503, which, though not expressly, yet tacitly refers to proceedings *pendente lite* (see Collett's Specific Relief Act, pp. 234, 237. Collett on Injunction and Appointment of Receiver, pp. 198 and 200).

"It is also argued that the books and accounts, &c., 'were under attachment.' This is not the case as the documents were produced into Court by Appáji Chetti upon notice under s. 130 issued at the instance of Sevoloyammál in petition No. 514 of 1880.

"I now pass to consider the plea of limitation. It is argued by defendant's counsel that so long as Mr. Hannyngton's order, dated 29th October 1880, made special provision for the recovery of the debts which might be barred by limitation or otherwise, the injunction issued will not save the bar.

"Mr. Hannyngton's order on petition No. 516 of 1880 is clear. He forbids first and second defendants from collecting any debts due to the firm, but directs special application to be made in regard to debts, the recovery of which might be barred by limitation or otherwise. Hence the plaintiffs' powers of recovery of debts were in no way restrained, while the first and second defendants could have applied to this Court within the statutory period for the recovery of debts liable to be barred.

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13. C. L. J. 487

"It is further apparent that the plaintiff might argue that, since the Court had possession of the accounts, books, &c., she had no means of ascertaining what debts were or were not barred. This is not the case, as before decree, the parties or their agents had access to the accounts in the Commissioner's hands and they had ample time and opportunities to make themselves informed of the nature of the debts.

"It might be argued that the decree in original suit No. 17 of 1880 is not final. I think it is final, for it has awarded that the plaintiff is entitled to recover Rs. 34,000 and odd, &c., and all the other reliefs prayed for excepting the mode of realization have been granted. The parties treating the decree as such took out execution.

"For the above reasons I find on the first issue that the suit is not sustainable, and on the second that the debt is barred.

"I therefore dismiss the suit. Each party to bear his own costs."

The plaintiffs appealed to the High Court on the following grounds:—

(1) The appointment of the receiver is not *ultrâ vires* as held by the Lower Court.

(2) Even if it were, the suit is sustainable, inasmuch as he holds the appointment by virtue of the order of the Court and inasmuch as the parties really interested in the suit are made plaintiffs already and one of them is ready to verify the plaint.

(3) The suit is not barred.

(4) The Lower Court did not properly construe the injunction order and its effect has not been rightly understood.

Mr. *Grant* for appellants.

The Advocate-General (Hon. *P. O'Sullivan*) for respondent.

The judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.) was delivered by

TURNER, C.J.—There is nothing in the Code of Civil Procedure which limits the power of the Court to appoint a receiver after decree where this course is necessary or proper. The Judge's ruling on this point cannot be sustained. The further question arises whether the suit is barred by limitation. It is barred unless the provisions of s. 15 of the Limitation Act apply.

It appears that one of two partners died. His widow brought

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a suit against the surviving partner to wind up the partnership, and on 25th October 1880 she obtained an order prohibiting the surviving partner from collecting any sums due to the firm. The Judge, in granting the order, intimated that application might be made for the recovery of any debts which might become barred by limitation or otherwise.

It is argued that this injunction did not prevent the institution of suits; but an order prohibiting the collection of debts is an order prohibiting their collection by suits or otherwise. Again, it is argued there might have been an application for a special order. This is true, but the persons having the right to sue were not bound to make such application.

The law places the person interdicted from collecting debts under a disability, and s. 15 of the Limitation Act was intended to prevent the accrual of any injury to the person so interdicted from such disability. The surviving partner could not have sued without violating the injunction laid upon him. The widow of the deceased partner could have sued alone if the surviving partner had refused to join her in the suit, but as she was aware of the prohibition imposed on him, we consider she was justified in not filing a suit. Under the circumstances, the section in our judgment applies, and the plaintiffs are entitled to a deduction of the period from the date of the injunction up to date of the appointment of receiver.

The decree will therefore be set aside and the case remanded for retrial on the other issues including an issue as to whether, notwithstanding the deduction of the period of time, the suit is not barred by limitation.

All costs of this appeal incurred hitherto will abide and follow the result.

As to the memorandum of objections, if the suit is dismissed, there is no reason why defendant should not receive all his costs.

The costs of the objections will also abide and follow the result.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Kernan.

15 Mad. 69.

1884.
April 18.

11 Mad. 140, 197.
13 Do. 25, 273.
12 All. 506.
16 Mad. 328
19 Do. 59.
20 Do. 290.
22 Bom. 316.
21 Mad. 235.
3 C.L.J. 258.

VYDINÁTHA AND ANOTHER (DEFENDANTS NOS. 2 AND 3), PETITIONERS,

and

SUBRAMANYA AND ANOTHER (PLAINTIFF AND DEFENDANT NO. 1), RESPONDENTS.*

Madras Civil Courts Act, s. 12—Jurisdiction—Suit for partition—Subject-matter of suit.

In suits for partition the value of the property of which the plaintiff claims a share, and not the value of the share claimed, determines the jurisdiction of the Court under s. 12 of the Madras Civil Courts Act, 1873.

THIS was an application to the High Court under s. 622 of the Code of Civil Procedure by Vydinátha Ayyan and Panchapakása Ayyan, defendants Nos. 2 and 3 in Suit No. 1 of 1882 on the file of the District Múnsif of Tanjore, to set aside the decree in the said suit passed under s. 522 of the Code of Civil Procedure, confirming an award of arbitrators. The fourth ground on which the award was impugned was that the District Múnsif's Court had no jurisdiction to entertain the suit, inasmuch as the subject-matter exceeded Rs. 2,500, the pecuniary limit of the jurisdiction of the Court. The suit was brought by Subramanya Ayyan against his three brothers for partition of family property, and one-fourth share claimed by the plaintiff was valued in the plaint at Rs. 1,641-12-0.

Mr. *Subramanyam* for petitioners.

Mr. *Devarájáyyar* and *Bháshyam Ayyangár* for respondents.

The Court (Turner, C.J., and Kernan, J.) delivered the following

JUDGMENT:—The suit, as brought, properly asked for a partition of the whole of the family property and the award of possession to the plaintiff of such a share therein as might fall to him.

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* Civil Revision Petition 272 of 1883.

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VYDINÁTHA v. SUBRAMANYA.

Unless there was an agreement avoiding the necessity for a general partition among the several members, the share of any one member could hardly be ascertained; but, whether this be so or not, the whole property is subjected to the Court for the purpose of partition, and the relief claimed can only be awarded by a Court which has a pecuniary jurisdiction sufficient in amount to allow it to entertain a suit for the partition of the whole estate. It is not denied that the value of the whole property is in excess of the pecuniary limits of the Múnsif's jurisdiction. We must, therefore, set aside the proceedings subsequent to the institution of the suit and direct the Court of First Instance to return the plaint to the plaintiff for presentation in the proper Court. Each party will bear his own costs incurred up to this date.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1884. October 22.

SUBBARÁYANA AND ANOTHER (DEFENDANTS No. 2 AND No. 3), APPELLANTS,

and

SUBBAKKÁ AND ANOTHER (PLAINTIFF AND DEFENDANT No. 4), RESPONDENTS.*

Hindú Law—Parent and child—Duty of son to maintain aged mother.

According to Hindú Law, a son is bound to support his aged mother whether or not he has inherited property from his father.

THIS was a suit brought, *in formâ pauperis*, by Satiralla Subbakká to recover from her sons Satiralla Ramanna, Subbaráyana, Pedda Munappa, and Muni Rachappa, Rs. 68 a year for life for her maintenance and Rs. 50 for "house and utensils."

The plaintiff alleged that the defendants turned her out of their house in October 1880 and refused to maintain her.

The District Múnsif of Palamanér (T. Swámi Ráu) dismissed the suit on the ground that the defendants had taken no property from their father, and were, therefore, not bound to maintain the plaintiff.

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* Second Appeal 550 of 1883.

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On appeal, the District Judge of North Arcot (D. Buick) found that by agreement between the defendants Muni Rachappa had undertaken to support the plaintiff, and, citing *Savitribái* v. *Luximibái*, (1) Manu, ch. VIII, pl. 389; *Thakoobái* v. *Rámábái*,(2) held that all the defendants were bound to support the plaintiff whether or not they inherited property from their father. The District Judge decreed that the defendants should pay to plaintiff Rs. 5 a month from the date of the plaint, viz., on the 1st of October and 1st of March in each year Rs. 30, for maintenance.

Subbaráyana and Pedda Munappa appealed to the High Court, making Subbakká and Muni Rachappa respondents to the Appeal, on the grounds—

(1) that the plaintiff was a party to the arrangement by which Muni Rachappa contracted to support her;

(2) that sons were not bound to support their mother unless they inherited property from their father.

Anandácharlu for appellants.

Mr. *Powell* for respondent No. 1.

The Court (Muttusámi Ayyar and Hutchins, JJ.) delivered the following

JUDGMENT:—Respondent No. 1, the plaintiff Subbakká, is the appellants' mother, and the respondent No. 2 is their brother. Subbakká brought this suit against her sons for maintenance, and the appellants denied their liability for the claim. They alleged that they inherited no property from their father, and contended that at a division among the brothers made in 1868 it was arranged that the respondent No. 2 should take a house and jewels of Rs. 150 in value, which had been left by their father, and maintain the first respondent, that the appellants should pay their father's debts amounting to about Rs. 1,000, and should not be liable for their mother's maintenance. The District Judge held, on appeal, that the appellants were bound to maintain their aged mother, though they had inherited no property from their father, and that, if the arrangement which they set up were true, it would only enable them to claim contribution. It is argued, on appeal, that respondent No. 1 was a party to the arrangement made with the respondent No. 2, and that the sons' obligation under Hindú Law to maintain his aged mother irrespective of paternal property is

(1) I.L.R., 2 Bom., 573. (2) Borr. 487 (cited at I.L.R., 2 Bom., 592).

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not legally enforceable. It was not alleged in the Courts below that the mother was a party to the arrangement set up by the appellants, and we are not at liberty to permit new questions of fact to be raised on second appeal. The texts cited by the District Judge show that sons are bound to maintain their aged parents, and we are referred to no authority by the appellants in support of their contention. This appeal fails, and we dismiss it with costs.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884. November 20.

CHATHUNNI AND OTHERS (DEFENDANTS), APPELLANTS,

and

SANKARAN AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Malabar Law and Custom—Inheritance—Issue of parents governed by different systems of law.

Where a woman belonging to a Malabar tarwad governed by the Marumakatayam law (succession by nephews) has issue by a man who is governed by the Makatayam law (succession by sons), such issue are *primâ facie* entitled to their father's property in accordance with the Makatayam law and to the property of their mother's tarwad in accordance with the Marumakatayam law.

THIS was an appeal from the decree of V. P. de Rozario, Subordinate Judge of North Malabar, in suit 29 of 1881, dated 30th October 1882.

The plaintiff, Nangiléri Sankaran, and his two younger brothers sued Nangiléri Odénan and eight others (1) to remove Odénan from the office of karnavan of the Nangiléri tarwad; (2) for a declaration that defendants 5 to 9 were not members of that tarwad; (3) to prevent defendant No. 5 from interfering with the management of the tarwad property; (4) to have Sankaran made karnavan; (5) to recover certain tarwad property conveyed by Odénan to defendants 2 to 4 by way of gift.

The Subordinate Judge decreed claims (2), (3), and (5).

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* Appeal 50 of 1882.

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Defendants 5, 6, 7, and 9 appealed against the decree on claims (2) and (3) making the plaintiffs and defendant No. 1 respondents.

The appellants and respondents belonged to the Tiyan caste.

The plaintiffs' case was that they and defendant No. 1 belonged to the Nangiléri tarwad, which was governed by the Marumakatayam law (succession by nephews), and that Katkandi Chathunni Vydier and his brothers (defendants 5 to 9), who were the issue of a woman called Chiruda, a member of the tarwad, by Katkandi Chandu, a Tiyan of South Malabar, who followed the Makatayam law (succession by sons), had no right or connection with the Nangiléri tarwad. Upon this question the judgment of the Subordinate Judge was as follows:—

"Defendants 5 to 9 are the issue of this marriage, and the question before the Court is as to the law by which they are governed—whether it is Marumakatayam, which would make them members of their mother's tarwad, or Makatayam, by which they would become members of their father's family, or whether they are governed by both laws. There has been no decision on the status of the offspring of a Makatayam Tiyan by a Marumakatayam woman. The judgment in Original Suit 28 of 1873 of the late Subordinate Judge of Calicut, K. Ráman Náyar, merely decided that a Tiyan woman, governed by Marumakatayam, does not forfeit her right to her family property by her having been once married to, but subsequently divorced by, a Tiyan who followed the Makatayam rule. The decision of the late Principal Sadr Amín of Tellicherry, K. Krishna Menon, in Original Suit No. 29 of 1865 cited at the hearing was on the question whether the son of a Mapilla following the Makatayam rule by a woman of a Marumakatayam family was entitled to a share in his father's property. The question was decided in the affirmative. The Sadr Amín observed that the father was a Muhammadan, and that, as far as he was concerned, the Muhammadan law was the guide; that the son's succession to the karnavanship of the tarwad was a pure accident, and did not in the least extinguish his right of succession to his father's estate; and that 'the fact of a man's status being governed by two opposite rules of descent may appear at first sight somewhat ludicrous, but a moment's thought will show that it is not an impossibility in a country where a man of a family whose right of inheritance runs through the male line is allowed to marry from a

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family whose right of inheritance runs through the female line. The occurrence of such anomalous cases as this must last as long as the anomalous system of inheritance is permitted.' This decision, notwithstanding the language employed, does not affirm what some of defendants' witnesses assert that a man of a Marumakatayam tarwad whose father is a Makatayam man is governed by two opposite laws by which the tarwad property passes to his nephews and his self-acquired property to his sons. This double law of inheritance is what Mr. Holloway in Appeal Suit No. 110 of 1861 termed a 'piebald' system of descent. He decided against the validity of the custom. Mr. Wigram in his Commentary on Malabar Law, page 152, observes 'that the custom exists, notwithstanding the attempts of the Courts to stifle it, seems to be undoubted.' In this work Mr. Holloway's judgment is referred to, as also two other cases, one in which the late Sadr Court questioned the propriety of two distinct laws of inheritance prevailing in the same family, and the other before the Privy Council in which the custom was held not sufficiently established.

"In Appeal Suit No. 144 of 1875 on the file of this Court the question arose whether the issue of a Makatayam Mapilla by a Marumakatayam woman was governed by the Makatayam or the Marumakatayam rule. My decision upholding the former rule was upheld by the High Court in Second Appeal No. 815 of 1880. The High Court observed 'that it is not the legal consequence of the marriage of a Muhammadan in whose family succession is governed by the Makatayam law with a Muhammadan lady in whose family such succession is governed by the Marumakatayam law that succession to the property of the husband will be governed by the Marumakatayam law; and if, under the circumstances, it would be competent for the husband or the descendants of the marriage to elect that succession should be governed by the one or the other law, it is found that, so far as evidence can be gathered of an intention from the manner in which the property was enjoyed, the husband and his descendants in the case before us intended to retain the Makatayam law."

"In *Thathu Boputty* v. *Chakayath Chathu* (1) a Tiyan governed by the Marumakatayam rule claimed the guardianship over his

(1) 7, M.H.C.R., 179.

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children by his deceased wife who followed the same rule. The High Court observed 'the karnavan is as much the guardian and representative for all purposes of property of every member within the tarwad as the Roman father or grandfather; moreover, the relation of husband and wife does not in Malabar disturb this condition. These children have no claim whatever upon the property of their father, but their rights are entirely in that of their karnavan's family.' The reasonable deduction, from the language employed by the High Court, appears to me to be that if marriage disturb the condition, and the children had a claim upon the property of their father, the decision would have been the other way.

"These are nearly all, if not all, the decisions which have any bearing upon the question now before the Court, and none of them is decisive on the point in dispute."

After discussing the evidence, the judgment proceeded as follows:—

"The evidence on the side of defendants is wholly insufficient to outweigh the evidence on the part of plaintiffs showing the existence of custom acted upon by which the issue of Marumakatayam woman by a Makatayam man become members of their father's family, losing all right to their natural tarwad. In the present case defendants 5 to 9 lived with their father, assumed his family name, inherited his property, and discharged his debts. Fifth defendant has further contracted a marriage in Calicut with a Makatayam woman, and his son examined as a witness (fourth witness) by plaintiff states, truly enough, that he is heir to his father's property and is entitled to his acquisition including what his father derived from his own father, the witness' grandfather. From this it is clear that if defendants are to be held governed by Makatayam to enable them to inherit to their father and Marumakatayam to succeed to their tarwad, the two systems will come into conflict, for according to Marumakatayam defendants' acquisitions will be claimed by their tarwad and according to Makatayam by their offspring. Which is to prevail? If Marumakatayam, then all the descendants of the mixed marriage now recognized as Makatayam will become Marumakatayam, a transformation which no Court will lend its aid in effecting, for it cannot be concealed that there is a wide feeling of discontent with the Marumakatayam system among the classes which are governed by it, and by none

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is the hardship of the rule more felt than by Tiyans, who, having adopted a system of marriage and acquired with it, as the natural consequence, a love for their offspring, are debarred by this system from transmitting to them their acquisitions which descend to some remote relation who is not unfrequently a third or fourth cousin of the acquirer. In the present case there is sufficient evidence of the existence of the custom asserted by plaintiffs in justifying my holding defendants 5 to 9 to be members of their father's family governed by Makatayam rule, and that they have no right to be considered members of plaintiffs' tarwad."

The grounds of appeal were as follows:—

"(1) Because the Lower Court was wrong in assuming the existence of the institution of marriage among the Tiyans in the sense in which marriage is recognized in Hindú Law.

"(2) The Lower Court was wrong in saying that a female member of a Marumakatayam tarwad and her issue lose their interest in her tarwad by her marriage with a man who follows a different law.

"(3) The Subordinate Judge ought to have found that by custom the defendants 5 to 9 have not lost their interest in their natural tarwad by the marriage of their mother.

"(4) Because the conduct of the parties shows that the appellants have not given up or forfeited their right.

"(5) Because the injunction prayed for ought not to have been granted, the fifth defendant being the karnavan.

"(6) Because the fifth defendant has the right to manage the tarwad properties."

Mr. *Shephard* for appellants.

The Advocate-General (Hon. *P. O'Sullivan*) for respondents.

The Court (Turner, C.J., and Hutchins, J.) delivered the following Judgment:—

The question raised in this appeal is whether or not the children of a lady governed by Marumakatayam Law and of her consort who was governed by the Makatayam Law lose all right in the property of their mother's tarwad?

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One of the appellants' witnesses, who claims to be an authority on matters of succession, indicates what appears to us the right principle for the decision of the question. He says that it is the natural right of the children of the lady to derive from their mother such rights of inheritance as would ordinarily pass to children under the peculiar Law of Marumakatayam. It lies on those who would deprive them of that right to prove that the customary law disallows their succession.

It has no doubt been asserted that the descent of property from a father according to Makatayam Law and from the mother according to Marumakatayam Law in one and the same family is an incongruity. But similar incongruities are not unknown to the law elsewhere. Ordinarily, no doubt, the succession to immovable property is governed not by personal but by local law.

Where this is the case, as in England, we may find property descending according to the general law, and property descending according to a special local law, to different members of one and the same family. Thus, the eldest son may succeed to one estate in virtue of the general law of primogeniture and the youngest to another in virtue of the custom of Borough English, and all the sons in equal shares to a third in virtue of the custom of Gavelkind. Again, if an Englishman has married a lady enjoying property governed by the law of a foreign country, the children would inherit their father's immovable property in England according to English law and their mother's immovable property in the foreign country according to the law of that foreign country.

Primâ facie then, where a Makatayam man has married a Marumakatayam lady, the issue would be entitled to their father's property in accordance with the rules of Makatayam Law and to the property of their mother's tarwad in accordance with the Marumakatayam Law.

In this case the evidence adduced by the respondents to prove a custom to the contrary is far too slight.

Five witnesses were examined by the respondents on this point. The first, no doubt, asserted the existence of this custom, but was unable to illustrate it by any case in which there has been an actual devolution of property. He too is contradicted by his own close connexion, the fifth witness for the respondents, who supports the appellant's case, claiming his father's property under the

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Makatayam Law and his mother's under the Marumakatayam Law. The second witness asserts the existence of the custom, but he too can give no instance in which children have been deprived of their rights in the property of their mother whose family followed the Marumakatayam Law.

The third witness, a vakíl in the Múnsif's Court of Painád, affirms that the custom exists, but he is unable to explain it, and he cannot give any instance in which it has operated.

All that the fourth witness says is that his mother is a Marumakatayam lady, and that he has no right in the property of her tarwad.

The evidence of the first witness for the respondents explains what is possibly the foundation of the opinions given by him and other witnesses for the respondents. He says that in some families the ladies receive dowers in extinguishment of their claims upon the family property, whether the family follows Makatayam or Marumakatayam Law. This makes against the respondents' contention and tends to show that the custom alleged may be a mere matter of contract. The fifth witness, whose mother is a member of the Nangiléri tarwad to which the respondents belong, asserted he was in the enjoyment of rights under both laws, that he followed Marumakatayam Law as far as his mother's properties were concerned, and Makatayam so far as his father's properties were concerned, and he explicitly denied the existence of the custom alleged by the respondents. The third witness for the appellants, who professed to be a referee in caste disputes among Tiyans (the caste to which the parties belong), supported the appellants' allegation that, on the marriage of a Marumakatayam lady to a Makatayam husband, neither she nor the children who may be born to her lose their right by Marumakatayam Law to the property of their mother's tarwad. He gave as an instance the case of a vakíl whom he mentioned, and whose house-name shows he is a member of his mother's tarwad.

The fourth witness for the appellants supports their case and asserts, as we have observed, that the right of the children is derived from their relationship by blood. He mentioned that his niece had married a Makatayam husband who had died, and that, although she continued to reside with her brother-in-law, her children lived with him in their mother's tarwad.

The case cited by the Subordinate Judge decided that a Tiyan

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woman following the Marumakatayam Law does not forfeit her right in the property of her tarwad by having been once married to, and subsequently divorced from, a Tiyan who followed the Makatayam rule. This case, in so far as it has a bearing on the question before us, supports the appellants' case. So also does the decision of the Principal Sadr Amín, Mr. K. Krishna Menon, in Original Suit 29 of 1865, where it was held that the son of a Marumakatayam lady was not deprived of the right to inherit from her Makatayam father. Against the opinion of Mr. Justice Holloway, when Judge of Malabar, we may set that of Mr. Wigram, who asserts that the custom of double inheritance exists, notwithstanding the attempts of the Court to stifle it. In Appeal Suit No. 144 of 1875 all that the Court decided was, that the property of the Makatayam husband would be governed by Makatayam Law. There is nothing in any of these cases which compels us to a conclusion different from that which the better evidence in this case establishes as to the practice of the people and which is in conformity with natural justice.

We are not expressing any opinion on the question as to whether it is or is not optional to the issue of such marriages to adopt, in respect of the property over which they have absolute power, either law of inheritance. According to the principle enunciated in *Abraham* v. *Abraham*,(1) respecting converts to a religion which imposes a law of inheritance differing from that imposed by their original faith, it would seem they have such a right. All that the respondents' witnesses have shown is, that it is usual for the descendants of such marriages to elect the Makatayam Law.

No objection was taken to the finding of the Subordinate Judge that the gifts, which it was in part the object of the suit to set aside, were invalid.

So much of the decree of the Court of First Instance as declares that the defendants 5 to 9 have no right in the plaintiffs' Nangiléri tarwad, or to its properties, and as restrains the defendant No. 5 from interfering with the management of the tarwad property must be reversed.

The respondents must bear the appellants' costs of this appeal, and each party will bear his own costs in the Court of First Instance.

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(1) 9, M.I.A., 199.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884.
August 21.
November 17.

16 Cal. 523.
13 All. 432.
18 Bom. 89.
22 Calc. 33.
23 Do. 791.
35 Mad. 183
32 C. L. J. 479

GANGÁDHARA (PLAINTIFF), APPELLANT,

and

SIVARÁMÁ AND OTHERS (DEFENDANTS), RESPONDENTS.*

Mortgage—First mortgage paid off by third mortgagee in ignorance of second mortgage—Registration—Notice—Intention to keep alive first mortgage presumed.

S mortgaged land to P. G subsequently obtained a decree, by consent, against S, creating a charge on the same and other land, and registered the decree. A, in ignorance of G's decree, paid off P's mortgage, but took no assignment thereof, and took a mortgage from S of all the land covered by G's decree. In a suit by G against S and A to enforce payment of his mortgage debt:

Held, that A, not having had notice of G's decree, was entitled to stand as first incumbrancer in respect of the money paid to discharge P's mortgage, and that, even if registration was legal notice, an intention to keep alive P's mortgage was to be presumed in favour of A, in accordance with the ruling of the Privy Council in *Gokul Doss Gopal Doss* v. *Rambux Seochand*. (L.R., 11 I. A. 126.)

THIS was an appeal from the decree of J. C. Hughesden, District Judge of Tinnevelly, dated 30th July 1884, reversing the decree of P. Tirumal Ráu, Subordinate Judge of Tinnevelly, in suit 40 of 1882.

The suit was brought by Gangádhara Rámáyyar against Sivarámá Mudali,(1) Ayyaváyyar,(2) Parasurámáyyar,(3) and Muttukrishnáyyar(4) to set aside certain orders of the Subordinate Court, dated 28th March and 29th June 1881, releasing, on the petition of defendants 2, 3, and 4, certain land from attachment made in execution of the decree in suit 39 of 1877 obtained by plaintiff against defendant No. 1.

The Subordinate Judge decreed for plaintiff; defendant No. 1 to pay the costs of all parties to the suit.

On appeal, the District Court dismissed the suit.

The plaintiff appealed to the High Court.

The facts appear sufficiently for the purpose of this report

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* Second Appeal 387 of 1884.

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from the judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.). GANGÁDHARA v. SIVARÁMÁ.

Mr. *Shephard* and Hon. *Rámá Ráu* for appellant.

Bháshyam Ayyangár for respondents.

Brajeshware Peshakar v. *Budhanuddi*(1) was cited for appellant. For respondents *Gokul Doss Gopal Doss* v. *Rambux Seochand*(2) was relied on, and it was contended that there was no difference between the case of a purchaser and a third mortgagee. In reply it was contended that the decision in the latter case did not go beyond the decision in *Adams* v. *Angell*.(3)

On the 17th day of November the following judgment was delivered by

TURNER, C.J.—Sivaráma Mudali, the respondent No. 1, was the owner of the five plots of land mentioned in the plaint.

In 1866 he mortgaged plots 1, 2, and 3 to Pushpavánalingam Mudali, who, in October 1877, obtained a decree for the enforcement of his mortgage.

In the same year the appellant, Gangádhara Rámáyyar, brought Original Suit No. 39 of 1877 against Sivarámá Mudali, and, in February 1878, he obtained a decree on a compromise, providing for the payment of the judgment-debt, as therein mentioned, and declaring the lands now in suit hypothecated as security for the payment in accordance with the terms arranged. The petition in which the terms of the compromise were notified to the Court contained the following statement:—"The defendant assures that he has not till now encumbered the mortgaged property either by mortgage, hypothecation, &c., to any other person." The decree was duly registered. On 23rd May 1878 the respondent No. 1 borrowed Rs. 3,500 from the respondents 2, 3, and 4 and mortgaged to them the five plots of land. Of the sum of Rs. 3,500 Rs. 1,900 were paid to Pushpavánalingam Mudali, who, in consideration of the payment, released his lien on the plots mortgaged to him—Nos. 1, 2, and 3.

Default having been made in payment of the sums due under the decree in Original Suit No. 39 of 1877, the appellant attached the properties hypothecated: the respondents 2, 3, and 4 filed an objection and the properties were released. The appellant then

(1) I.L.R., 6 Cal., 268. (2) I.L.R., 11 I.A., 126.
(3) L.R., 5 Ch. D., 634.

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instituted this suit to obtain a declaration that the properties hypothecated are liable to be sold in execution of his decree, and that, inasmuch as his lien is prior to that held by the respondents, he is entitled to have the sale made free from the incumbrance held by them.

Respondents 2, 3, and 4 pleaded that the hypothecation of the lands to the appellant was fraudulent and relied on their mortgage deed. No evidence was given in support of the allegation that the hypothecation in the appellant's favour was contrived fraudulently.

The Subordinate Judge held, in the absence of such proof, that it was to be presumed the compromise had been accepted by the appellant in good faith, and, finding that respondents 2, 3, and 4 had not obtained a transfer or assignment of the prior hypothecation, which had been discharged with the loan obtained from them, he held, in advertence to previous decisions of this Court and to the decision of the Privy Council in *Pandoorung Bullal Pandit* v. *Balakrishnen* (1) that the appellant's lien was entitled to priority. On appeal, the Judge considered that the statement made in the petition to the Court that no prior liens subsisted made out a *primâ facie* case of fraud against the appellant, and that, as the appellant had not rebutted it, the plea that the lien was obtained by fraud was established. While he agreed with the Subordinate Judge that the respondents 2, 3, and 4 were not, on the other grounds urged, entitled to priority, he on this ground reversed the decree of the Subordinate Judge and dismissed the suit. In appeal, it is contended that the suit should not have been wholly dismissed, assuming that the appellant had failed to establish that he was entitled to the sale of the lands Nos. 1, 2, and 3 free of the lien held by respondents 2, 3, and 4, for, as there was not any question that the sum decreed to him was a *bonâ fide* debt, he was at least entitled to the sale of the lands subject to the incumbrance held by these respondents.

This objection must be allowed. Again it is argued that no case of fraud was, *primâ facie*, established against the appellant, and to this contention we also accede. The statement in the petition of the 5th February 1878, if it proved anything, proved no more than that the appellant had been himself deceived. There

(1) 2 M.I.A., 60.

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being no other evidence that the lien asserted by the appellant was procured by fraud, the question arises whether the respondents 2, 3, and 4 are entitled to priority to the extent to which they satisfied the lien of Pushpavánalingam Mudali. It has not as yet been held in this Court that registration is notice: for all that appears, the respondents 2, 3, and 4 had no notice of the lien created by the decree in the appellant's favour; without such notice they would be in no worse position than purchasers for value, who, ignorant of the insecurity of their title, had discharged an incumbrance, that is to say, they would be entitled, in respect of the sums paid by them to discharge the lien of Pushpavánalingam Mudali to stand as first incumbrancers. Even if they had had notice, they are entitled under the recent ruling of the Privy Council in *Gokul Doss Gopal Doss* v. *Rambux Seochand*(1) to have an intention to keep alive the security presumed, unless the contrary is shown. Under these circumstances, the decree of the Appellate Court in so far as it reversed the decree of the Subordinate Judge in its entirety and dismissed the suit must be reversed and the decree of the Subordinate Judge must be modified as to Nos. 1, 2, and 3 by declaring that the sale must be made subject to the lien of the respondents for Rs. 1,900, the sum paid to Pushpavánalingam. Each party will bear his own costs in all Courts, as neither has fully established his contention.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

VENKATA (DEFENDANT), APPELLANT,

and

RÁMÁ (PLAINTIFF), RESPONDENT.*

1884. October 7. November 25.

9 mad. 241. 10 " 226. 20 Do. 456. 21 Do 48. 22 mad. 204.

Regulation VI of 1831—Act IV of 1866 (Madras)—Karnam's inám land—Hereditary office—Enfranchisement—Inám Commissioner's title-deed—Title to emoluments of office.

The lands forming the emoluments of an hereditary village office having been separated from the office by Government, were enfranchised and granted by the

(1) L.R., 11 I.A., 126.

* Second Appeal 195 of 1884.

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Inám Commissioner to V, who had been appointed to, and, at the date of enfranchisement, held the office without possessing any hereditary claim thereto.

In a suit by R, who claimed to be of the family of the hereditary office-holders, to recover the land from V,

Held, by the Full Bench (Hutchins, J., dissenting) that R could not recover.

THIS was an appeal from the decree of J. D. B. Gribble, District Judge of Cuddapah, dated 28th November 1883, confirming the decree of V. Subramanya Sástri, District Múnsif of Proddatúr, in Suit 567 of 1881.

The suit was brought by Settipalle Rámá Subbayya against Ballávaram Venkata Rámáyya to recover certain land valued at Rs. 660, which, the plaintiff alleged, had belonged to his ancestors as karnam's inám. The Collector of the District had given this land to the defendant when the defendant was appointed to the office of karnam on the 13th October 1877, and, when the inám lands were enfranchised, the Inám Commissioner gave the title-deed to the defendant. The defendant pleaded, *inter alia*, that the plaintiff had no right to sue, inasmuch as the order appointing him karnam in 1877 had not been cancelled.

The plaintiff's claim was decreed by the District Múnsif. On appeal, the District Court reversed this decree on the ground that the Civil Courts had no jurisdiction.

This decree having been reversed on appeal by the High Court (Kindersley and Hutchins, JJ.), the suit was remanded and the decree of the Múnsif was then confirmed.

Sadagopácháryar for appellant.

Gurumurti Ayyar and *Sadásiva Ayyar* for respondent.

On the 3rd September 1884 the case was heard by a Division Bench (Hutchins and Brandt, JJ.) and was referred to a Full Bench for decision by Hutchins, J., who delivered the following

JUDGMENT:—The main facts of this case are identical with those of the cases relied on by the appellant—*Kamatchi* v. *Agilanda*,(1) *Srinivása* v. *Lakshmamma*,(2) *Bada* v. *Hussu Bhái*,(3) and S.A. 390 of 1883(4). The subject-matter is an enfranchised service inám, and the appellant was the office-holder at the time of the enfranchisement, while the respondent is the representative of a former incumbent and sued to recover the land.

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(1) I.L.R., 6 Mad., 334.
(2) I.L.R., 7 Mad., 206.
(3) I.L.R., 7 Mad., 236.
(4) Not reported.

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It is admitted that the lands were appurtenant to the office of karnam, and that such office belonged hereditarily to the respondent's family. If the lands had not been enfranchised, the respondent might unquestionably have instituted a suit before the Collector under Regulation VI of 1831, and I think there can be no doubt whatever that, unless the respondent was personally unfit for the office, the Collector would have been bound to give it him with all its emoluments. It seems hardly worth while to cite authorities to show that all suits under Regulation VI of 1831 were decided upon this principle. To ensure the office being held by a qualified person, the Executive was compelled to reserve to itself the determination of all claims, but subject to this one condition the absolute right of hereditary succession has been repeatedly recognized. The office was of course impartible and inalienable, but it was repeatedly laid down that, even when a village officer was dismissed for misconduct, his nearest heir should be appointed in his place, unless either manifestly unfit or a participant in the misconduct. It was only when there was no member of the family hereditarily entitled, who was fit for the duty, that the Executive considered itself at liberty to confer the office on a stranger; and even then it was distinctly laid down that the stranger's incumbency was to last only as long as the life of the dismissed servant, and on the death of this party the office is to revert to the family, and to be filled by his next-of-kin fit for service. The hereditary right even of a female has been repeatedly recognized by both the Board and the Government. In such cases it was usual to appoint a gumasta from the relations of the family, or, failing them, a stranger, but such gumasta or stranger was always removable at pleasure. In my judgment, it can hardly be questioned that if the respondent had preferred his claim before the Collector prior to the enfranchisement of the inám, the office would have been given to him and some other person, possibly the respondent, enrolled as his gumasta.

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What really happened was this. The plaintiff's adoptive father died in 1870, and his death rendered the office vacant. The plaintiff was then a child and a claim was lodged on his behalf; but in 1874, probably on the ground that he claimed through an adoption, the Divisional officer directed that he should produce a certificate of

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heirship, and that meanwhile the inám should be classed as siwái-jamá—in other words, that the full assessment should be collected from the cultivators and credited to Government as extra land revenue.

On the other hand, the appellant was appointed karnam in 1877, and at the Inám settlement, made a year or two later, the lands were enfranchised in his name as the person at the time in possession. It is admitted that he had no hereditary claim, and he has since been removed from office on that very ground. As the Múnsif has pointed out in an able and well-considered judgment, the appellant's claim to retain the lands rests solely on what the Múnsif calls the casual incident of his having held the office and the ináms at the time of settlement.

What then was the effect of the Inám settlement is the question to be determined. When Mr. Justice Kindersley and myself remanded this suit, the District Court having held that it had no jurisdiction, it appeared to me, and I believe to my learned colleague also, that the intention of the Legislature, as well as of the Executive under whom the Inám Commissioner acted, was that any person, who could have sued before the Collector for the office and its emoluments prior to the enfranchisement, would now be entitled to sue for the lands before the Civil Courts. In other words, any person hereditarily entitled and whose claim had not been considered and rejected by the Collector, can now enforce his right to the enfranchised lands through the Courts. I thought that the effect of the enfranchisement of the lands from the condition of service was simply to prevent unfitness for service being pleaded to a suit for the lands, and that the only advantage given to the person in whose favor or name the enfranchisement was made was to throw on any other claimant the burden of proving his claim. And this is no slight advantage when it is remembered that the lands must be deemed to have been the sole property of the office-holder or person entitled to the office, and that Madras Act IV of 1866, s. 3, expressly provides that no decision already passed by a Revenue officer under Regulation VI of 1831 shall be called in question by the Civil Courts.

On the other hand, it is contended that the Government had the absolute disposal of these service ináms, and that they have

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chosen to give them to the appellant. Is that the effect of what the Government has done? I think not, and I shall endeavour to show this hereafter. For the present I merely wish to point out that, if it had been intended that the enfranchisement in favor of the actual incumbent should be conclusive, nothing could have been simpler than to say so, whereas all that Act IV of 1866 provides is that the lands shall be no longer subject to the condition of service, and that the previous Revenue decisions shall not be questioned. A decision under the Regulation need not, perhaps, be a formal adjudication in an actual suit, but it must be an order to which the claimant or some one on his behalf was a party and against which he might have appealed. A mere order of appointment made behind the claimant's back cannot, in my judgment, be deemed a decision at all.

Before considering further the effect of the Inám settlement, I will notice the decisions already given by this Court, and I will at once admit that, if the *dicta* contained in the judgments are correct, the view which I am disposed to adopt is wrong. But it seems to me that in none of the cases yet decided did the precise point now at issue arise, and that the principles to be applied ought to be more fully considered.

In *Kamatchi* v. *Agilanda*,(1) the plaintiff's brother had been dismissed and the defendant appointed in his stead. On attaining his majority the plaintiff applied for the office, but the Collector rejected his claim. It was held, and I think quite rightly, that this was a decision against him, and that his only remedy was to have appealed to the Revenue Board. In the course of the judgment, however, it was pointed out that the Civil Courts were still debarred from taking cognizance of claims to hereditary offices, and it was said that, until the plaintiff obtained the office, he was not entitled to the emoluments, and that, as the emoluments were severed from the office before he obtained a recognition of his right to the office, the Civil Courts cannot award them to him. The existence of a decision against the plaintiff was fatal to his claim: the correctness of the other principle laid down appears to me open to serious question.

(1) I.L.R., 6 Mad., 334.

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In *Srinivása* v. *Lakshmamma,*(1) the plaintiff had himself been dismissed as unfit for the office, and it was held, no doubt rightly, that, when he was removed from the office, he lost his right to the lands. Here, again, there had been a decision which the Civil Courts could not question.

In *Bada* v. *Hussu Bhái,*(2) the plaintiff's mother had applied for his deceased father's share, the plaintiff himself being in jail, and the Revenue authorities had declined to recognize the private division set up by her, and again relied on by the plaintiff before the Civil Courts. Consequently the whole inám had been conferred on the defendant, who had been admittedly holding the office for more than thirty years. Although the plaintiff was not himself a party to this decision, the claim had been made on his behalf, and it was clearly a question of policy, with which the Courts had nothing to do, whether the alleged division of 1845 should be recognized or not. The plaintiff's claim had been considered and those of another member of the family preferred. It seems to me that this would have been a sufficient ground for rejecting the claim, but the judgment appears to lay down a general principle that no one, who has not held the office, can claim the lands formerly appurtenant to, but now severed from, it. I was a party to this judgment myself, but in agreeing to it I had regard to the particular facts of the case, and did not intend to admit the principle as one of universal application.

There is another case, unreported, *Kakerla Chirra Reddi* v. *Thathi Reddi Pulla Reddi* (Second Appeal No. 390 of 1883). The decision there was expressly put on the ground that the defendant was in possession of the office and its emoluments under a decision of the Collector which stood unreversed, and it appears from the pleadings that the Collector had bestowed the office on the defendant by an order to which the plaintiff had been a party and against which he had appealed to the Board.

Second Appeal No. 170 of 1884 was heard at the same time as the present case. The facts were very similar to those of *Bada* v. *Hussu Bhái*, and we dismissed the suit on the ground that from motives of policy before enfranchisement the Revenue authorities had suppressed the office, or share of the office, held by those under whom the plaintiff claimed.

(1) I.L.R., 7 Mad., 206. (2) I.L.R., 7 Mad., 236.

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I had intended, before referring this case to a Full Bench, to go more fully into the effect of the Inám Commissioner's operations, but the papers which I asked for have not yet been submitted, and I do not like to defer the reference any longer. I apprehend that there will be no difficulty in showing that the Government in appointing an Inám Commissioner, and the Commissioner in carrying out the settlement, expressly abstained from going into any disputed title. In this respect I believe there was no difference between personal ináms under Regulation IV of 1831 and service ináms under Regulation VI of the same year. The one class were as much at the absolute disposal of Government as the other: the Government could have resumed either, or they could have conferred either on any one they pleased: but what they did was, I believe, simply to withdraw their own claim while imposing a quit-rent and to leave all claimants to the land, subject to that quit-rent, to get their respective titles determined by the Civil Courts.

With these remarks, I would refer this case to a Full Bench.

BRANDT, J.—I have no objection to this case being referred to a Full Bench, reserving my opinion on the question referred.

On the 7th of October 1884, the case was heard by the Full Bench (TURNER, C.J., KERNAN, MUTTUSÁMI AYYAR, HUTCHINS, and BRANDT, JJ.).

On the 25th of November the following judgments were delivered:—

TURNER, C.J.—The office of karnam was created for the discharge of *quasi*-public functions. When education was not general, the arts of writing and keeping accounts, like other crafts, were exercised by particular families, and so it came to pass that in very many places the office of karnam descended from father to son, and by custom became hereditary.

Emoluments for the discharge of the duties of the office were provided either in the shape of land exempt from revenue or subject to a lighter assessment, or of fees in grain or cash, or of both land and fees.

The importance of securing the due performance of the duties of the office led at an early period of British administration to the enactment of Regulations respecting it.

Regulation XXIX of 1802, after adverting to the expediency

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of continuing the office "on an efficient establishment," provides for the maintenance in permanently-settled zamíndáries of offices of record under karnams. It confers on the proprietors the nomination of karnams and, recognizing the custom of hereditary descent in subordination to securing efficiency in the office-holders, it prescribes that in filling vacancies in the office of karnam the heirs of the preceding karnam should be chosen, except in cases of incapacity proved before the Zila Judge, in which cases the land-holders are to be free to exercise their discretion in the nomination.

The Regulation goes on to declare the duties of the karnams so appointed, and provides penalties in the shape of fine and imprisonment for the neglect or fraudulent performance of such duties. The Regulation does not provide for the performance of such duties by deputy. It treats the office as it might any other public office as one of which the duties are to be discharged personally, and prescribes personal penalties for the breach of them. Even while allowing a customary right by inheritance to create a preferential title to the office, it does not treat it as creating an unqualified right, but makes the personal capacity of the claimant a condition essential to its recognition.

It is noticeable that this Regulation, possibly in order to secure the independence of the office-holders, makes no provision for their dismissal when once they have been appointed.

Regulation II of 1806, s. 7, declared that certain of the rules of Regulation XXIX of 1802 should not extend to districts where the revenue was not permanently settled, but that in addition to the rules prescribed by ss. 11, 12, 17, 18, 19 of Regulation XXIX other rules mentioned therein were thereby enacted for the due discharge of the duties of karnams. The rules which were thus awkwardly imported from the earlier Regulation were those which relate to the duties of karnams and to the penalties to which they were liable; the further rules enacted by the later Regulation placed the karnams under the immediate authority of the Collectors, empowered Collectors without restriction to nominate persons to the office for the approval of the Board of Revenue, and declared a karnam so appointed liable to removal from office for incapacity, disobedience or the neglect of the Collector's orders, or for falsifying or mutilating accounts, or if having abandoned

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the duties of his office for other pursuits he failed to return or reassume them within one month.

Here, again, it will be seen that the terms of the Regulation made no provision for the performance of the duties by deputy. On the other hand, the context presumed a personal discharge of the duties of the office, and liability to personal penalties for breach of duty was imported from the earlier Regulation. Regulation II of 1806, s. 7, with the exception of clause 2, which subjected the karnams in districts not permanently settled to the control of the Collectors, was repealed by Act XII of 1876 (Obsolete Enactments), but I have referred to it as showing what was up to the date of its repeal the law which regulated appointments to the office.

The question as to whether the incapacity which resulted from sex or age is such as is contemplated by Regulation XXIX of 1802 came on more than one occasion before the Court.

In *Alymalummaul* v. *Vencatoovien*,(1) a woman, and in *Oolaty Bhoopatyrauz* v. *Vuddy Patty Gaurrauze*,(2) a minor, were held by the Sadr Court incompetent. The Court was not unaware that in some instances these disqualifications had not been recognized by the Revenue authorities, but it observed that the chief aim of the Regulation was "not to make the office an hereditary one, but to prescribe rules for having it filled up and the duties thereof efficiently discharged, consistently with which aim alone the claims of heirs to succeed thereto can be respected."

The decisions of the Sadr Court were followed by this Court in *Venkataratnamma* v. *Rámánujasámi*,(3) and it must be taken, until those decisions are overruled, that in the case of permanently-settled estates inability by reason of age or sex to discharge personally the duties of the office is a sufficient disqualification.

It will be observed that Regulation II of 1806 did not impose on the Revenue authorities the obligation to have regard to hereditary claims in appointing karnams in districts not permanently settled. But the Board of Revenue very properly considered such claims should be recognized to the extent to which the Regulation XXIX of 1802 had allowed them. In Proceedings of 25th September 1849, addressed to the Collector of Trichinopoly, the Board observed that when it was hereditary the right would of course be

(1) 2 M.S.D., 85. (2) M.S.D., 1853, p. 91. (3) I.L.R., 2 Mad., 312.

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respected so far as was consistent with a capacity to discharge the duties attached by the Regulation to the office.

So far then the Board and the Courts were in accord. The Board inferred as the Court inferred that the primary consideration in making the appointment was the personal competency of the candidate.

But the Board proceeded to interpret the term capacity in a sense which the Court could not accept and which in effect rendered the qualification of capacity unmeaning. It was held that because the Regulation did not positively prohibit the performance of the duties by deputy they might be so performed. It must be at least open to serious doubt whether, when a *quasi*-public office is created or recognized by law and duties imposed on the holder, it is competent to him to devolve those duties on a deputy unless such power is expressly given or may be inferred from the context. Here, if any inference is to be drawn from the context, the Regulations intended that the duties of the office should be performed by the holder and by him only. The earlier Regulation expressly made capacity a qualification for appointment: the later Regulation expressly declared that incapacity was a good ground for dismissal. The Regulations, moreover, prescribed fine and imprisonment as penalties for negligence or misconduct, and it is certainly not probable that the latter penalty would have been authorized except for the breach of a strictly personal obligation.

In the view that the duties of the office might be discharged by deputy, the Board of Revenue has in some cases allowed the appointment of females and minors, though it ordinarily postpones the claims of any female to a male member of the family. If the principle is sound that the duties may be performed by deputy, the privilege so to perform them would attach to males as well as females, and the provisions of the Regulations respecting incapacity will apply only to cases where persons are incapable of appointing deputies.

It can hardly be contended that this was the intention of the Legislature. But while the Regulations appear to have required the appointment of a competent person to the office of karnam, the Revenue authorities were left unfettered by any legislative direction compelling them to recognize the hereditary claims of a person incompetent to discharge the duties of the office. It seems

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to me not open to question that if the Revenue authorities disregarded such an hereditary claim and appointed to the office a person who had no such claim, the appointment could not have been pronounced illegal.

The Madras Regulation VI of 1831, after reciting that emoluments derived from lands, &c., had been annexed by the State to various hereditary and other village offices in the Revenue and Police departments as wages for the performance of public services, and that it was necessary that such emoluments should in no case be separated from the offices to which they had been attached by the State, declares that all such emoluments were inalienable from such offices by mortgage, sale, gift or otherwise; that all transfers which might thereafter be made thereof by the holders of such offices should be null and void; that such emoluments should not be liable to attachment or other process in satisfaction of decrees of Court; that claims to the possession of, or succession to, hereditary village or other offices in the Revenue or Police departments or to the enjoyment of any of the emoluments annexed thereto should not be cognizable by the ordinary Courts of Judicature, but should, in the first instance, be adjudicable by the Collector of the district from whose decision an appeal was given to the Board of Revenue. It was further declared that nothing in that regulation should be construed to affect in any way the office of karnam established under Regulation XXIX of 1802 in districts of which the land revenue had been permanently fixed.

The Regulation VI of 1831, it will be observed, recognized the emoluments attached to the office of karnam in districts not permanently settled as annexed to the office by the State and as annexed as wages for the performance of public duties.

When the emoluments consisted of land, the land did not become the family property of the person appointed to the office, whether in virtue of an hereditary claim to the office or otherwise. It was an appanage of the office inalienable by the office-holder and designed to be the emolument of the officer into whose hands soever the office might pass. If the Revenue authorities thought fit to disregard the claim of a person who asserted an hereditary right to the office and conferred it on a stranger, the person appointed to the office at once became entitled to the lands which constituted its emolument.

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In course of time it appeared to the Government desirable to substitute money wages for the emoluments theretofore attached to the office of karnam and to allow the holders of the office to enfranchise the lands theretofore held as wages on payment of a quit-rent; and when lands had been so dealt with it no longer became necessary to continue the provisions of the Regulation prohibiting their alienation and exempting them from the jurisdiction of the Civil Courts. Consequently Act IV of 1866, recognizing the right of the Government in the past and in the future to enfranchise such lands, and that the effect of enfranchisement was to place them in the same position as other descriptions of landed property in regard to their future succession and transmission, declared that such lands after enfranchisement should be exempt from the operation of Regulation VI of 1831. But it was provided that nothing in that Act should be construed as authorizing any Court of Civil Judicature to call into question decisions affecting any service ináms which might have been passed by Revenue officers acting under the provisions of Regulation VI of 1831 prior to the enfranchisement of such ináms.

Although Regulation II of 1806 had expressly declared that the lands attached to the office should be inalienable from the office, it happened in some instances that while one member of a family was recognized as the office-holder, other members enjoyed parts of the inám lands which constituted the emoluments of the office. This enjoyment was not and could not be recognized as legal (Circular Orders, Board of Revenue, 26th October 1858; 19th March 1852; Macleane's Standing Orders of the Board of Revenue, p. 244; *Alymalummaul* v. *Vencatooven*), (1) and could only be held by sufferance on the part of the persons actually appointed to the office. Where the persons having hereditary claims were rejected as disqualified or removed for misconduct, they had no claim to the emoluments and ordinarily did not enjoy them. When a stranger was appointed his appointment did not create an hereditary claim in his descendants, and in some instances it may have been temporary or provisional.

The facts of the case now before the Court in appeal appear to be the following:—

(1) 2 M.S.D., 85.

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The office of karnam in the village of Pedda Settipalle was actually held by three persons; but there were three other persons, of whom one was the person alleged by the plaintiff to be his adoptive father, who were recognized as having an hereditary claim to the appointment, and who were termed *ghair misldárs*, or men out of office. In this character the plaintiff's father had obtained or been allowed by the office-holders to hold some of the inám lands. It does not appear whether the three karnams and the three *ghair misldárs* were or were not members of one family: nor does it appear whether the same lands were uniformly held by persons appointed to the office from the several families or branches of the family.

The person alleged to be the adoptive father of the respondent having died on the 17th February 1874, the natural father of the respondent applied that the ináms held by the deceased should be granted to the respondent as the adopted son of the deceased. Another person made a claim at the same time. An order was passed by the Deputy Collector on 17th February 1874, as follows:—

"There seems to be no reason to grant the ináms to petitioners. Both the petitioners will have to establish their right in Court, and until then the lands should be in siwáíjamá, that is to say, at the disposal of Government."—Exhibit A.

The Deputy Collector could not by this order have intended that the claim to the inám should be preferred to a Civil Court. What he meant was that the respondent's status as the adopted son of the deceased should be established in the Civil Court before his application in the Revenue Court could be disposed of.

It appears that the Revenue authorities in 1877 saw reason to complain of the lax manner in which the duties were being discharged. A report was made by the Tahsildár that some of the office-holders were incompetent, and it was suggested that the appellant should be appointed fourth karnam, and that he should receive as his emolument certain of the lands attached to the office "to which there were no heirs and which were then at the disposal of Government." The Collector sanctioned the appointment of the appellant and directed that he should be put in possession of inám lands calculated to produce an income of Rs. 100 and of which some had in his lifetime been held by the respondent's

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adoptive father. There is nothing to show that the appointment of the appellant was provisional. The Collector, although he was by the rules bound to give a preference to a person having an hereditary claim to the office if duly qualified, was entitled to appoint a stranger if there was, in his judgment, no person having an hereditary claim who was so qualified. His order, until it was recalled or reversed, constituted the appellant a karnam as absolutely as if he had been a person who had been entitled to preference in virtue of hereditary right. The Inám Commissioner in 1880 enfranchised in the name of the appellant the ináms then held by him. Certain persons other than the respondent claimed under the Regulation possession of the lands, but their claims were rejected and the appeal of one of them was disallowed.

In 1881 it was considered desirable that there should be one karnam only, and the appellant was confirmed as sole karnam; but one of the karnams then dismissed appealed, and, as he had held office longer than the appellant, his appeal was allowed and he was appointed sole karnam in substitution for the appellant.

The respondent brought this suit to recover from the appellant the lands which have been enfranchised to him.

The Courts below have considered whether or not they are at liberty in view of the provisions of s. 3 of Act IV of 1866 to entertain the suit, and have held there has been no decision of the Revenue authorities which estops from so doing.

Under a rule of the Board of Revenue applications made by persons aggrieved by an order of the Collector assigning inám lands to an office-holder for the revision of that order cannot be entertained after the lapse of three years from the date when possession has been given, and assuming that the respondent had made an application for the cancelment of the order of 17th October 1877, his application would not have been entertained after three years from the date of that order.

Seeing that the Revenue authorities would not have disturbed the order after three years, although it was not made *inter partes*, I think it possible they would have understood the order as a decision. But I do not think it necessary to determine this point, nor to consider whether, under the order of the Board or the general law, the period for an application to disturb such an order

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can be limited, for it appears to me that the respondent has not shown any title to the relief which he asks.

The averment in the plaint that the lands in suit belonged to the respondent's ancestors is not supported by any proof, and in view of the terms of Regulation VI of 1831 cannot, I think, be maintained.

It may be that in some instances the land is not the emolument of the office but a reduction of the assessment. In such a case the Government could not resume the land, but only deal with the assessment. But in the case before us the orders of the Revenue authorities show that the lands are and were attached to the office, and, though the respondent's father may have improperly obtained possession of them, the Government was at liberty to resume them and to confer them on the office-holder, and it did so confer them on the appellant through the Collector in 1877.

The respondent is one apparently of several persons who have an hereditary right to the office, and, if he had been appointed to the office before the lands were enfranchised, he might have had a foundation for his claim to some of the lands in suit; but he was not appointed to the office, and, if he should now be appointed to it, the lands have ceased to constitute its emolument.

On the ground that the respondent was not the holder of the office when the lands were enfranchised, I must hold that he has failed to show a title to the lands and that his claim is unfounded. If he had established a title, if he had shown that at the time of the enfranchisement of the inám he had been appointed to the office, the Court would have had jurisdiction to determine whether the enfranchisement in favor of the appellant could be supported I would reverse the decrees of the Courts below and dismiss the suit with costs.

KERNAN, J.—I agree with the Chief Justice that the decrees should be reversed and the suit dismissed with costs. The plaintiff never was either appointed karnam under Regulation VI of 1831, or in possession of the land attached to and inalienable from the office under that Regulation. His claim now is that he ought to have been appointed to the office and put into possession of the lands: under ss. 1, 3 and 4 of that Regulation, such claim was, and still is, in the words of the Regulation and of Act IV of 1866, exclusively "adjudicable" by the officers of the Government in

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the Revenue Department. Section 3 of the Regulation declares that such claims shall not be cognizable by the ordinary Courts of Judicature.

Act IV of 1866 does not repeal ss. 3 or 4 of the Regulation, as far as regards the power given to the Government officers in the Revenue Department to appoint karnams. That Act merely enfranchises the lands from the condition of service and permits the grant of them by the Inám Commissioner free from the inalienability and non-liability to execution provided by s. 2 of the Regulation. The ordinary Courts of Judicature cannot determine whether the plaintiff ought to have been appointed or should be considered as entitled to the office of karnam. I do not think the case calls for any decision whether the defendant holds the land granted by the Commissioner as his own or as a member of an undivided family.

MUTTUSAMI AYYAR, J.—The question referred for our decision in this case is whether the respondent—plaintiff—is, upon the facts found, entitled to the possession of the land in dispute. The land was a service inám attached to the office of karnam in the village of Pedda Settipalle, Prodattúr taluk, Cuddapah district. In 1870 the inám was in the possession of one Sivannaghári Narasanna, who, though he had a hereditary claim to the office of karnam, was then one of three *ghair misldárs* (men who did not hold the office), the duties of the office being discharged by three others. Narasanna died in 1874, and, the respondent being then a minor, his natural father claimed possession of the inám for him on the ground that Narasanna had adopted him. It appears that there was also a rival claimant. The Deputy Collector in charge of the division, instead of proceeding to adjudicate on the claim under s. 3, Regulation VI of 1831, referred the parties to a Civil Court to establish their rights of succession to Narasanna and directed that the nett proceeds of the inám be credited to Government under the head of siwáijamá, so that they might deal with them finally as they thought fit. Against this order the respondent's natural father preferred no appeal. In 1877 the Tahsildár of the taluk complained to the Collector of the inefficiency of the office-bearers, and suggested the appellant's appointment as a fourth karnam, adding that the lands of those who left no heirs might be annexed to the new office as emoluments. The Collector adopted

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the suggestion and, appointing the appellant as the fourth karnam, directed that lands yielding an income of Rs. 100 per annum be placed in his possession. The land now in litigation forms part of them. The appellant entered on the duties of his office as the fourth karnam and got into possession of the land in suit in 1877.

In 1880 the inám was enfranchised on behalf of Government by the Inám Commissioner. The respondent asserted his hereditary claim before that officer, but he was referred to a Civil Court with respect to this land, the inám being enfranchised in the name of the appellant, who was the party in possession. In 1881 the number of karnams was reduced from four to one, and the Board of Revenue dispensed with the appellant's services on the ground, as is admitted, that he had no hereditary claim to the office. It is found by the Courts below that Narasanna had adopted the respondent. It is not, however, clear when his minority ceased, though the plaint conveys the impression that it continued till 1879. The question for decision is, whether the respondent is entitled to the land because his adoptive father, though a *ghair misldár*, had a hereditary claim to the office and held the inám now in dispute from 1870 to 1874.

It was argued for the respondent that Civil Courts are not competent under section 3, Act IV of 1866, to question the act of the Collector. On the other hand, it was contended for the appellant that the title-deed issued to him by the Inám Commissioner gave him a valid title to the land. As to the enfranchisement, it was in substance a commutation of the service tenure into a liability to make a fixed money payment, and it operated only to change the tenure and place the inám on the same footing with other private property. The fact that the enfranchisement was made with the appellant only shows that, he was then in possession as ostensible owner. As to the contention that, under section 3, Act IV of 1866, it is not competent to us to question the Collector's order of 1877, it cannot be supported. Reading section 3 of Act IV of 1866 together with sections 3 to 6 of Regulation VI of 1831, the prohibition seems to me to be confined to decisions passed in the exercise of the judicial powers conferred upon the Collector by that Regulation. The order of the Collector in 1877 can only be regarded, in the circumstances in which it was made, not as a judicial decision, but as one passed in the exercise of his general

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authority over the office of karnam. Again, the removal of the appellant from the office of karnam in 1881 and the declaration by the Board of Revenue that he had no hereditary claim are of no avail to the respondent, inasmuch as their jurisdiction over the inám had ceased with its enfranchisement. If the appellant lawfully held the office and inám at the date of enfranchisement, the inám would become his property. The substantial question is whether the respondent's right had lawfully been determined and transferred to the appellant. By reason of the enfranchisement, the inám is exempted from the operation of Regulation VI of 1831 by section 2, Act IV of 1866. It may be that parts of that Regulation are not repealed because all the village service ináms in the Presidency have not been enfranchised. It is therefore open to us, in my judgment, to consider whether the respondent's right was legally determined.

There is no doubt that the respondent's father had a hereditary claim to the office of karnam, but it does not appear that he ever held it. His hereditary right was regulated by Regulations II of 1806 and VI of 1831. According to section 2 of the last-mentioned enactment, all emoluments derived from lands annexed by the State to hereditary village offices were inalienable from such offices either by mortgage, gift, sale or otherwise, and all transfers which were thereafter made by the holders of such offices were null and void. The possession of the respondent's father, then as a *ghair misl* karnam from 1870–74, was contrary to the Regulation and therefore illegal. It was probably due to an arrangement made with the office-bearers, not uncommon in this Presidency, whereby the office-bearers discharged the duties of the office, but its emoluments were divided by them with their co-sharers. Such an arrangement being, however, null and void according to the Regulation, the respondent's father had no legal right to continue in possession, and the Collector was at liberty to put an end to it at any time and reattach the land to the office from which it was illegally severed. Even according to the Standing Order of the Board of Revenue, which as a matter of policy enjoined consideration to the party in possession, Collectors were required, in cases where persons doing no duty were enjoying the profits of the office, to restore the emoluments to persons who actually performed the work when a lapse took place.

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According to the law, therefore, as it stood prior to the enfranchisement of the inám, a right to the land could only be legally acquired through the right to the possession of the office, and neither the respondent's father nor the respondent had then any vested interest in the office to sustain an action in the nature of an ejectment. It may be that the respondent's father and the respondent had the chance of a reversion in case there was a vacancy among the office-bearers and the respondent was qualified for the office when the vacancy occurred. Neither event happened in this case. The event that actually occurred was the nomination of an additional karnam owing to the incompetency of the office-bearers whom the Collector was entitled to dismiss. These, who had a vested right to claim possession, did not think it fit to impugn the arrangement. The respondent according to his averment was then a minor, and it cannot be held that an arrangement made under such circumstances to ensure an efficient performance of the duties of the office was illegal. But our attention is drawn to the orders of the Board of Revenue that, when a stranger to the family is appointed on the dismissal of the incumbent for the time being for misconduct and owing to the absence of qualified persons who have not participated in it, he should be appointed with the proviso that his appointment was to last only as long as the life of the dismissed servant, and that females and minors may be appointed, the duty of the office being temporarily performed by deputy. Although if the appellant's appointment was made provisionally or temporarily it might make a difference, still it was not so made in this case. The question is—is such appointment illegal? There is nothing either in Regulation II of 1806 or VI of 1831 to warrant the conclusion that the permanent appointment of a stranger is illegal, when there is no one duly qualified for the office in the family having hereditary claim.

It is provided by Regulation XXIX of 1802, s. 7, which applies to the office of karnam in permanently-settled districts, that in case of incapacity the heirs of the last karnam need not be chosen and that landholders shall be free to exercise their discretion in the nomination of persons to fill vacancies. Though it was not extended by s. 7 of Regulation II of 1806 to districts of which the revenue was not permanently fixed, there is no reason to think, as pointed out by the learned Chief Justice, when the

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whole Regulation is considered, that the intention was to deny to the Collector the discretion which a zamíndár or proprietor had.

The Standing Orders of the Board can only be regarded as suggesting cases in which a strict enforcement of the law in protection of the right vesting in the State to the performance of the duties of the office by a qualified person in the family may be temporarily waived either on grounds of policy or from consideration due to the family having a hereditary claim to the office. It seems to me that they cannot be regarded by a Court of Justice as part of the Regulations so as to invalidate an act permitted by them, though they might be accepted as grounds for departmental interference. Even assuming that the Collector's act was not authorised by his superiors, the respondent took no action to impugn it for three years.

It was ruled by the Board of Revenue that no incumbent should be ousted from his office by reason of defective title if he had held it continuously for three years.

On these grounds I am also of opinion that the respondent—plaintiff—is not entitled to the possession of the inám, and that the appellant's appointment was legal owing to the respondent's incompetency when it was made.

BRANDT, J.—The respondent—plaintiff—does no doubt allege in his plaint that his alleged adoptive father was in enjoyment of that part of the land, the holding of which land free of assessment constituted the emoluments of the office of karnam, for possession of which respondent sues.

But the respondent does not allege that his adoptive father ever held the office of karnam.

From the exhibits filed in this case, which have now been more fully explained than they were at the hearing of the appeal by the Divisional Bench, it would appear that there were three working karnams, while three others, of whom plaintiff's adoptive father was one, were *ghair misldárs* or "not registered"—not office-holding—karnams, though they enjoyed some portions of the rent-free lands.

There is nothing to show how long the respondent's minority lasted, and nothing to support the suggestion of the District Judge that the appellant was appointed, *ad interim*, to perform the duties of the office subject to disposal of respondent's application. The

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appellant was appointed on the ground that another karnam was required in addition to the then working karnams, who were three in number: and the fact that the appellant's services were in 1881 dispensed with under the orders of the Board of Revenue, one of the former three working karnams being appointed in his place, does not appear to me in any way to help respondent's case.

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The effect of the enfranchisement, by and under Madras Act IV of 1862, of all ináms of the classes described in clause 1, s. 2, of Madras Regulation IV of 1831, *i.e.*, of personal and hereditary grants of money or land revenue conferred by Government in consideration of (past) services rendered to the State or in lieu of resumed privileges, was, as is stated in *Cherukuri Venkanna* v. *M. L. Náráyana Sástrulu*,(1) "to remove from the claimants the disabilities to sue in the ordinary Courts of Judicature which Regulation IV of 1831 and the Acts explaining it had imposed:" and the Court went on to say that "No authority, however, was given to the (Inám) Commissioner to determine the rights of the claimants. The effect of his act, as explained by Madras Act IV of 1862, was to divest the Governor in Council of the jurisdiction to determine such claims and to vest the power of determining in the ordinary Courts."

Again Madras Act IV of 1866 recited that whereas in this Presidency certain ináms attached to hereditary and other village offices had been and may be enfranchised from the condition of service, the Inám Commissioner's title-deed should be deemed sufficient proof of the enfranchisement of such lands from the condition of service, and exempted lands so enfranchised from the operation of Madras Regulation VI of 1831 which had, among other things, excluded from the cognizance and jurisdiction of the ordinary Courts determination of claims to such offices and to the emoluments attached thereto.

The District Múnsif in his judgment in this case, which I admit is a well considered judgment on a subject open to some doubt, says that he does not see why the decision of this Court above quoted, and another to the same effect, should not hold good in the case of ináms formerly held on condition of service, as in the case of ináms given for past services, or in lieu of resumed privileges.

(1) 2 M.H.C.R., 327.

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And this view appears to meet the approval of my learned colleague at whose suggestion this case is referred to the Full Bench, viz., that "it was the intention of the Legislature as well as of the Executive under whom the Inám Commissioner acted, that any person who could have sued before the Collector for the office (of karnam in an unsettled district) and its emoluments prior to the enfranchisement, can now enforce his right to the enfranchised lands through the Courts," provided that the claim of such person had not been considered and rejected by the Collector before the enfranchisement of such inám.

It is conceded that there need not have been a formal adjudication in a suit brought as such under Madras Regulation VI of 1831, but it is said there must have been an order to which the claimant or some one on his behalf was a party and against which he might have appealed; that a mere order of appointment (and an appointment made in pursuance of that order?) is no decision (and the appointment no valid appointment?) at all.

It appears to me that there is a very material difference between ináms of the class and description specified in Regulation IV of 1831, and those described in Regulation VI of 1831. Whether or not ináms of the former class were, as my learned colleague suggests, as much at the disposal of Government as the latter, I do not think it necessary now to consider.

The respondent's claim may, I consider, be disposed of on the following grounds:—

He fails, as it appears to me, to make out any title at all. He does not set up a case of trespass, or of fraud on the part of the appellant. Allowing that the person who, he says, adopted him enjoyed part of the lands attached to the office of karnam,—and that he had a claim as good as, or better than, others of the family, an outsider was appointed to the office of karnam in 1877, and in virtue of that appointment obtained possession of the emoluments then attached to such office; while he so held the office and emoluments, Government enfranchised the service inám land and allowed the then office-holder to retain the land at less than the full assessment. Enjoyment of the emoluments intended as remuneration for the office of karnam by persons not doing the duties of the office was contrary to the express intention and provisions of Regulation VI of 1831, and the mere enjoyment of

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part of such emoluments by the respondent's father does not, in my opinion, give any support to the respondent's present claim.

The appellant was, whether properly or improperly as regards the claim of the respondent, appointed karnam by the Revenue authorities. There was, so far as appears, nothing to prevent the respondent from presenting a formal claim to, or from suing for the office in the Courts of the Revenue officers after the date of the appellant's appointment and before the land was enfranchised, and I do not think that because there was no formal adjudication on the respondent's claim to the office, we can regard the appointment made as no appointment at all.

The only ground then on which as it seems to me the respondent's case can be put is, that Government intended that the lands which had hitherto been held free of assessment as remuneration for karnam's service, but which were enfranchised on condition of payment of $\frac{5}{8}$ths of the full assessment when the lands were severed from the office, should be made over to the families of the hereditary karnams.

I think it may be taken that such lands were enfranchised in favor not of the family generally but of the office-holder for the time being, in which case they would presumably descend not to all the members of the family, but to the branch or heirs of the person in whose favor it was enfranchised. This would fully satisfy the requirements of the Acts of 1862 and 1866 as to such property "being placed in the same position as other descriptions of landed property, in regard to their future succession and transmission," and in the absence of any express intimation of an intention, or enactment that such lands were enfranchised subject to decision by the Civil Courts as to which member of the family might at the time of enfranchisement have had the best claim to the office, though not actually at that time holding the office, I am not prepared to hold that it is open to a Civil Court, after enfranchisement, to adjudicate on claims for the determination of which it would be necessary to decide that one person was at the time of enfranchisement entitled to the office from which the emoluments of the office have now been severed, and therefore entitled to land to which the obligation of service no longer attaches, in preference to another, who, at the time of enfranchisement,

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held the office in virtue of appointment made by an authority competent to make it.

HUTCHINS, J.—Having stated my views at some length when I proposed to refer this case to a Full Bench, I shall not again travel over the same ground, more especially as no other member of the Court has adopted them, and my individual opinion is probably wrong and, at all events, has ceased to be of any importance.

The facts of the case turn out not to be precisely what was represented to Mr. Justice Brandt and myself at the former hearing, and I am not prepared to say that this particular plaintiff ought to recover. I have not thought it necessary to consider this point because I understand, and I am glad that it is so, that my learned colleagues, or at all events a majority of them, have seen their way to determine the case on the broad issue which I brought before them, and to re-affirm the principle that no person can recover in the Civil Courts an enfranchised village-servant's inám, unless he was himself the holder of the office, or (possibly) in possession of the land at the time of the enfranchisement.

The principle and the consequences of this proposition will be best seen by putting a simple concrete case, based on the facts of the present case, but without some which merely tend to complicate it. A, the village karnam, died shortly before the enfranchisement. B, his adopted son, applied to succeed him. Without deciding the question, although in my opinion he was bound to have decided it, the Revenue officer referred him to a Civil Court to establish his adoption. Meanwhile he ordered the assessment of the land to be collected and credited to Government as siwáijamá—this was a mere provisional arrangement and certainly did not amount to a rejection of the claim. Subsequently, though not as a mere provisional arrangement, a stranger was appointed and took possession of the lands and office. The enfranchisement followed and the Inám Commissioner thereby released the land from the condition of service and commuted the Government's claims upon it to a quit-rent. The adopted son having established his adoption now claims the land. My learned colleagues consider that he cannot recover it because he was never in office. My view is that he can recover it, because he was clearly entitled to the lands (as well as to the office, although that is no longer in ques-

tion) unless for some reason the Government by its officers chose to reject his claim, because the lands have now been enfranchised from the condition of service, and because such claims to the lands (though not to the office) have again become cognizable by the Civil Courts, subject only to one condition, viz., that they shall respect the decisions of the Revenue Courts.

Suppose a still simpler case—that A died only in 1879 and that B, instead of being an adopted son, was the natural son and undoubted heir of his father; that for some reason B could not or did not come forward until 1880, when the stranger had been appointed and the land enfranchised. Assuming B to have been capable of performing the service he would undoubtedly have recovered both the lands and the office if he had sued before the Collector. Are we to take it that the Legislature, by re-transferring to the Courts the cognizance of claims to the lands, intended to prevent such claims from being litigated at all and to vest the lands absolutely in the office-holder for the time being? If that was the intention, what is the meaning of the provision that decisions already passed must be respected? It seems to me both a useless and a ridiculous provision, unless, in the absence of such a decision, the Civil Courts are to entertain and determine all claims just as they would if the condition of service had never been imposed and the lands never exempted from their jurisdiction.

The Act must be construed with reference not only to the previous positive enactments, but to recognized custom and the established practice of the Revenue Courts. It is quite true that the early Regulations nowhere mention that the office of karnam in unsettled estates is hereditary, and I entirely agree that, with regard to settled estates, the primary object of Regulation XXIX of 1802 was "not to make the office an hereditary one but to prescribe rules for having the office filled up and the duties thereof efficiently discharged." The reason was that the hereditary character of such office was the established common law of the country. Regulation VI of 1831 itself describes the offices as essentially hereditary. There was no need to introduce by enactment the hereditary principle of succession: on the contrary all the legislation on the subject was designed to prevent this principle being pushed to such an extent as to defeat the condition of service.

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I need not refer to authorities to show that it continued to be recognized by the Revenue officers. So strongly were they impressed with the absolute hereditary right that, until lately, the Executive did not consider itself at liberty to reject claims which had been allowed to remain dormant for very long periods indeed. It was only in 1880, I think, that it introduced a species of limitation by declaring that, after holding office without dispute for three years, a karnam should be maintained undisturbed for life. But even then the unsuccessful claimant could come forward again after his rival's death.

It was probably on similar grounds that the Executive did not consider itself at liberty entirely to ignore the claims of a female or minor. Up to the passing of Regulation VI of 1831 such claims seem to have been recognized by the Civil Courts. The contrary view was first laid down by the Sadr Court in 1844, but the Revenue authorities seem to have continued to follow the old practice, not being bound by the later decision of the Sadr Court. But it is not necessary to discuss this question in the present case, as it does not affect the construction of Act IV of 1866 (Madras).

It is however important to bear in mind one other circumstance, and that is, that very many of these inám lands were not originally granted as remuneration for services, but were the private lands of the family. In such cases the family was bound to supply a person competent to perform the services and the services were remunerated, not by a fresh grant of Government land, but by a remission of the assessment on the family pattá. One of the commonest questions in some districts was the question whether the land itself, or only its assessment, formed the office-holder's emolument. In the latter case some other arrangement than the deduction of the assessment from the pattá had to be made upon the appointment of a stranger, or the deduction was made from the stranger's own pattá, and notwithstanding the apparently stringent provision in Regulation VI of 1831 that the emoluments shall not be diverted from the office, nothing was commoner than to find a number of *ghair misldárs*, as they are called, in enjoyment of shares of the inám. A *ghair misldár* I understand to be a registered member of the family hereditarily entitled: he is registered, not as the actual office-holder, or *misldár*, but as a person holding a portion of the inám lands who has a claim to be

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considered in the event of another karnam being required. That this is the received interpretation may be gathered from the Deputy Collector's order of October 1877 (I) in this very case. After sanctioning the appointment of the defendant he goes on to say that any of the *misl* karnams who is found quite incompetent may be included in the *ghair misl*, and a competent man out of the *ghair misldárs* transferred to the *misl*. I do not of course say that such an order, or the practice which it recognizes, is in accordance with the principle of Regulation VI of 1831, although that Regulation nowhere prohibits the joint enjoyment of the whole family which supplies the working member, but the practice shows that great difficulty arose in carrying out that principle, and I believe that it was this practical difficulty, as much as anything else, which led to a system of cash salaries being substituted for grants of land or land revenue. If I am right in this belief, surely it tends to confirm my view that by the enfranchisement the Government simply commuted its claim and left to the Civil Courts the difficult task of adjusting the several claims upon the land.

Again, if the Government intended to confer the land absolutely on the office-holder for the time being and his heirs, why did they impose only a favourable quit-rent? They still give the office-holder emoluments by way of salary which they consider adequate remuneration for his services. Why should they not have resumed the land absolutely, unless it was that they knew that in a very large number of cases others than the actual incumbent had good claims upon it?

I do not at all shut my eyes to the many difficulties which my view involves. Where there are several persons equally entitled, for instance, it would be a difficult question whether they should all share the land, or, if not, on what principle the Courts should discriminate between them. I am not sorry therefore that my opinion has not prevailed, but as I find myself unable to subscribe to the view of the rest of the Court, I have felt bound to record my dissent. That my opinion does not materially differ from that held by the Inám Commissioner and Revenue officers acquainted with the former practice, may be gathered from the fact that in this, as in most similar cases, the claimant was expressly referred to the Civil Courts by the Commissioner. I believe I have also come across cases in which Collectors refused to exercise their

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VENKATA v. RÁMÁ.

jurisdiction under Regulation VI of 1831 on the ground that it was about to be transferred to the Civil Courts, which could very much better adjudicate between rival claimants.

ORIGINAL CIVIL.

Before Mr. Justice Kernan.

1885. February 6.

Ex parte PINSENT

In re DORASÁMI *v.* VENKATASÁMI AND OTHERS.*

Civil Procedure Code, ss. 336, 344, 638—Discharge of judgment-debtor arrested under decree of High Court.

A judgment-debtor having been arrested in execution of a decree of the High Court in its Original Civil Jurisdiction and brought before the Court under the provisions of s. 336 of the Code of Civil Procedure, claimed to be discharged on the ground that he intended to apply to the Court to be declared an insolvent either under the provisions of ch. XX of the Code or of 11 & 12 Vict., c. 21:

Held that the judgment-debtor on expressing his intention to file a petition and schedule under 11 & 12 Vict., c. 21, and complying with the conditions of s. 336 of the Code of Civil Procedure was entitled to be discharged.

ON the 6th of February 1885 C. P. Pinsent, a defendant in suit 165 of 1885, having been arrested in execution of the decree in the said suit and produced before Kernan, J., an application was made by his Solicitor (*A. Champion*) for his discharge under the provisions of s. 336 of the Code of Civil Procedure.

The following judgment was delivered by

KERNAN, J.—The defendant being brought before the Court, arrested in execution, applies to be discharged from custody, stating, under s. 336 of the Code of Civil Procedure, his intention to file his schedule as an insolvent under the general jurisdiction conferred by 11 & 12 Vict., c. 21, or under s. 344 of the Code of Civil Procedure. Though it cannot be said that s. 344 and the subsequent sections of that Act do not *in terms*, by the reference to s. 344 in s. 336, apply to the High Court, yet under s. 638 the jurisdiction of the High Court in insolvency is not interfered with by the Act.

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* C.S. 165 of 1884.

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This being so, the High Court, acting under 11 & 12 Vict., c. 21, has power to entertain a petition by a defendant who, if he so desired, might have acted under s. 344 and been declared insolvent.

This result probably was not contemplated by the Act, but as the jurisdiction in insolvency under 11 & 12 Vict., c. 21, is preserved, the only construction to be put upon s. 336 and s. 344, so as to prevent confusion of jurisdiction in insolvency and to carry out the object of s. 336, is to hold that, in the Presidency towns, a defendant arrested and brought before the Court on stating his intention to file his petition and schedule in insolvency within the time fixed by s. 336 shall be discharged on giving security. If he does not file such petition and schedule, then the consequences contemplated by s. 336 shall follow.

Section 336 is a substitution for the section of Act VIII of 1859, which enabled a debtor to be discharged upon surrendering all his property as directed by that Act. By adopting the above construction, the rights and remedies of both plaintiff and defendant are preserved and the object of the Legislature is carried out.

Let the defendant on complying with the conditions of s. 336 of the Code of Civil Procedure be discharged.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

MALLAMMA (PLAINTIFF),

and

VENKAPPA (DEFENDANT).*

1883. October 12. 1884. December 20.

10 Bom. 155. 11 do 6. 11 mad. 469. 12 do 61. 13 all. 339. 18 mad. 27 20 do. 371

Civil Procedure Code, s. 258—*Contract to certify satisfaction of decree—Breach—Suit for damages.*

The provision in s. 258 of the Code of Civil Procedure, 1882, which forbids any Court to recognize a payment under, or an adjustment of, a decree, unless certified to the Court executing the decree, does not debar a suit for damages for a breach of a contract to certify.

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* Referred Case 4 of 1883.

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25 Mad. 53.
26 Do. 23.

MALLAMMA v. VENKAPPA.

THIS was a small cause suit for Rs. 42, referred under s. 617 of the Code of Civil Procedure, for the decision of the High Court, by T. Rámáchandra Ráu, District Múnsif of Gooty.

The case was stated as follows.

"The document on which the suit is based runs thus:—

"Agreement executed by Mankáli Venkappa, Inámdár of Sangala, to Chinna Ramanna, son of Siddana Tippanna, residing at Dosaludiki, Gooty Taluk, on 11th Vysakha Bahúla of the year Vishu.

"'According to the agreement of compromise filed in Original Suit No. 122 of 1880 on the file of the District Múnsif's Court at Gooty, my inám and pattá lands cultivated by you should be enjoyed by you this year, and the Government assessment paid by you, and the lands given up to me next year. On these terms we have both compromised this day, and you have given up to me out of these lands, the ináms in the *Sikayapampu*, the inám and pattá lands in the *Peddovodlu*, the *Mittakayilu*, and the *Semkalammachenu* adjoining the village, and you have retained in your possession only the *Semkalammatala* on which the betel garden is standing. Therefore I shall pay the Government assessment, &c., payable by you for the said lands this year. I shall pay the assessment after deducting the assessment for the year Vikrama. The *Semkalammatala* having the betel garden should be given up to me by the 15th Chaitra Sudha of the year Chitrabhánu. I shall also get dismissed the decree obtained against you in Court. This is the agreement executed.'

"The decree last referred to is admitted by both parties to be that in Original Suit No. 15 of 1880 on the file of this Court. Ramanna, in whose favor the agreement was executed, is dead, and plaintiff is his widow.

"The plaintiff urges that the defendant Venkappa enjoyed the lands under the agreement, and yet executed the decree in Original Suit No. 15 of 1880 against her (decree execution petition No. 322 of 1882), and recovered Rs. 41-9-0 from her, and therefore seeks to recover Rs. 42, being the loss sustained by her by defendant having wrongfully enjoyed the lands.

"The defendant admits the agreement, and alleges that the lands were not made over to him under it. At the hearing, his vakíl further pleaded s. 258 of the Code of Civil Procedure as a bar to plaintiff's suit.

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"As to the facts, I am clearly of opinion from the evidence that defendant obtained possession of the lands under the agreement, and that, but for the point of law raised, plaintiff is entitled to recover the damages sued for.

"We next come to the point of law whether s. 258 of the Code of Civil Procedure bars this suit, and entertaining doubts about it, I beg to refer it for the decision of the High Court, at the instance of defendant.

"It is urged by plaintiff's vakíl that there was no direct adjustment of the decree under the agreement in question. The case *Kunhi Moidin Kutti* v. *Ramen Unni*(1) seems to support him. In my opinion there was only 'a promise' that satisfaction of the decree would be certified at some future date. But there was no payment 'in adjustment of the decree,' nor anything 'carried to the credit of the judgment-debt,' although plaintiff's husband 'may have depended upon the promise' of defendant being performed and upon 'an adjustment being made as the ultimate effect' of the agreement. It may also be urged that defendant could not have certified the adjustment till after he cultivated the land and reaped the crop on it unmolested.

"In the case *Davlátá* v. *Ganesh Shastri*(2) it was held that suits, like the present one, were maintainable under s. 258 of the Code of Civil Procedure as it stood before it was amended by Act XII of 1879, but doubts were expressed whether this would be the case under the amended section.

"The question referred for decision is, 'Is the present suit maintainable?' Contingent upon the opinion of the High Court, I decide it in the affirmative, and decree for plaintiff as sued for with costs."

The case was heard by a Division Bench (Kindersley and Hutchins, JJ.) on the 17th July 1883 and was referred for decision to the Full Bench on the 30th July. The following judgments were delivered :—

KINDERSLEY, J.—At the time of the Full Bench decision in *Viraraghava* v. *Subbakka*(3) I had not observed the verbal alteration of the words "such Court" to "any Court." I cannot feel sure that the alteration would make any difference. Having regard

(1) I.L.R., 1 Mad., 203. (2) I.L.R., 4 Bom., 295. (3) I.L.R., 5 Mad., 397.

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to the importance of the question, and to the existence of a Full Bench decision on the section as it stood before the amendment, I think the case should be referred to the Full Bench.

HUTCHINS, J.—The plaintiff's husband and the defendant entered into a rázináma in Original Suit 122 of 1880, reciting among other terms that the former should give up to the latter at once two out of three plots of land, and that the latter should certify satisfaction of the decree in Original Suit 15 of 1880 which he held against the former. Satisfaction was not certified, but the decree in Original Suit 15 of 1880 was executed. The plaintiff now sues for damages caused by the breach of defendant's promise, equivalent to the profit which she might have made out of the land if it had not been given up in consideration of defendant's promise.

The decision of this Court in *Arunáchella Pillai* v. *Appávu Pillai*(1) was under the Code of 1859 and has been practically overruled by *Viraràghava* v. *Subbakká*.(2) The latter case, however, was decided under the Code of 1877 before its amendment by Act XII of 1879. A later case to the same effect is reported —*Musutti* v. *Shekharan*.(3)

The High Courts of Calcutta and Bombay have also dissented from *Arunachella Pillai* v. *Appávu Pillai* (*Gunamani Dasi* v. *Prankishori Dasi*,(4) *Galawad Chandá Bhái* v. *Rahimtullá Jamál Bhái*.)(5) In the former case, Couch, C.J., and the majority of the Court held that a decree-holder was under a duty to certify a payment even without an express promise, and, if he obliged the debtor to pay a second time, became a trustee for the debtor for the payment which had not been appropriated to the decree. Both these cases were decided upon the Code of 1859.

In a later Bombay case—*Davlátá* v. *Ganesh Shástri*(6)—decided under the Code of 1877 before its amendment, the Court held that the view which it had taken under the old Code, viz., that such money might be recovered, had been clearly adopted by the Legislature, but it was intimated that the case might have been differently decided if it had fallen under the amended provision introduced by Act XII of 1879.

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(1) 3 M.H.C.R., 188.
(2) I.L.R., 5 Mad., 397.
(3) I.L.R., 6 Mad., 41.
(4) 5 B.L.R., 223.
(5) 4 Bom. H.C.R. (A.C.J.), 76.
(6) I.L.R., 4 Bom., 295.

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Then came the case of *Pátankar* v. *Devji*(1) when, with much regret, the same High Court held that suit for the recovery of such money was barred by s. 244 of the Code of 1877 and the last paragraph of s. 258 as amended.

The present case falls under the Code of 1882, in which s. 244 and the amended s. 258 are re-enacted *verbatim*. The former section requires that all questions arising between the parties and relating to the . . . . . discharge or satisfaction of the decree shall be determined by order of the Court executing the decree and not by a separate suit. The latter section, after providing that the decree-holder shall certify all payments under a decree which may be made out of Court, and that the debtor may take out a notice to compel him to make such a certificate, proceeds thus :—"No such payment or adjustment shall be recognized by any Court unless it has been certified as aforesaid." The word *any* has been substituted for *such*, which occurred in the Code of 1877, and the prohibition which formerly applied to the executing Court only has been deliberately extended to other Courts. No Court can now recognize an uncertified payment, and no question relating to such satisfaction can be determined in a separate suit.

I am, therefore, disposed to think that the present suit will not lie.

The question will be referred to the Full Bench as desired by Mr. Justice Kindersley.

The case was heard by the Full Bench (Turner, C.J., Kernan, Kindersley, Muttusámi Ayyar and Hutchins, JJ.) on the 12th October 1883.

Mr. *Subramanyan* for plaintiff.

Sadagopácháryar for defendant.

On the 20th December 1884 judgment was delivered by

TURNER, C.J.—It may be that the object of the Legislature, in enacting s. 258 of the present Civil Procedure Code, was to give effect to the policy which had been already approved in the enactment of s. 244. It was accepted as desirable that, when proceedings had been instituted, the rights of the parties in reference to the matter in issue should be finally and conclusively

(1) I.L.R., 6 Bom., 146.

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determined, and that no occasion should be given in the execution of decrees for the institution of fresh proceedings.

But to deprive a person, aggrieved by what is apparently a fraud, of a right to have recourse to the Court, the intention must be clearly expressed, and we must not carry the prohibition beyond the terms of the law.

The question which we have to consider is, whether, when a payment has been made or a new contract entered into for the purpose of satisfying a decree, and the object has failed by reason that the provisions of the law which are essential to its recognition as a payment or satisfaction of the decree have not been complied with, the person injured is deprived of a remedy by suit.

It appears to us that the grounds on which we held that such a suit would not be precluded by the provisions of s. 244 still obtain. In bringing the suit the plaintiff does not aver that a decree has been satisfied by the payment or contract. His case is that the decree was not legally satisfied. He raises no question as to the execution, discharge or satisfaction of the decree. He alleges only an intention that it should be satisfied—an intention to which the decree-holder might have given, but did not give, effect.

We have then to confine ourselves to the language of the amended provisions of s. 258.

Those provisions are so worded that full effect can be given to them without construing them to debar the institution of a suit for the recovery of money paid or damages for breach of the contract to certify.

The words of s. 258 are as follow:—"If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, or if any payment is made in pursuance of an agreement of the nature mentioned in s. 257A, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree. No such payment or adjustment shall be recognized by any Court unless it has been certified."

The term "payment" may mean either the act of paying money or the act and its result, the satisfaction of an obligation; the term "adjustment" is susceptible only of one meaning, an act and the result. Reading the terms together and interpreting the one

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by the other, they would be properly construed as having a like meaning, and thus give full effect to the word "such," which confines the terms with which it is connected to the sense in which they are used in the preceding paragraph of the section, where the payment is described as a payment of money payable under the decree and paid out of Court, and the word "adjustment" as an adjustment of the decree in part or in whole to the satisfaction of the judgment-debtor. The words "any Court" substituted for the words "such Court" are not deprived of a sufficient meaning by this construction, for whereas the words "such Court" were held to mean only the Court executing the decree, there are other cases in which it could with equal propriety be held that in the absence of a certificate a decree should be deemed unsatisfied; for instance, if a suit were brought for the administration of the judgment-debtor's estate, it might be incumbent on the Court to determine whether or not a particular decree had been satisfied, and the same question might arise in the winding up of a company. In these cases the Court may be a Court other than the Court executing the decree, or, if it were the same Court, it would not be engaged in executing the decree. The conclusion, then, at which we arrive is that, at least between the parties and their privies, a decree shall be treated by every Court as unsatisfied by a payment or arrangement out of Court, unless its satisfaction is certified. It is not necessary for us at present to determine whether these sections are intended to apply to persons other than parties to the decree or their privies; but if future legislation is resorted to, the effect on the rights of such persons will, we trust, receive consideration. The law remains, for our present purpose, substantially as it was before the substitution of the word "any" for the word "such," and the same reasons influence us in holding the suit maintainable as are expressed in our decision in *Víraràghava* v. *Subbakká*(1). Had the legislature intended to deprive the judgment-debtor altogether of his remedy, we are entitled to expect that plainer language would have been used. It might have been enacted that no separate suit should lie for the recovery of an unsatisfied payment, or words to the like effect might have been employed.

The Múnsif will be informed that the suit will lie.

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(1) I.L.R., 5 Mad., 397.

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20 Mad. 440
22 Ro - 350

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884. December 12.

NÁRÁYANA (DEFENDANT No. 1), APPELLANT,

and

NÁRÁYANA (PLAINTIFF), RESPONDENT.*

Malabar law—Kánam tenure—Improvements—Trees of spontaneous growth—Redemption suit—Costs of ascertaining value of improvements.

According to Malabar custom, kánams (mortgages) must, on the expiry of the term, either be discharged or renewed.

On redemption of a kánam, the kánam-holder (mortgagee) is not entitled to claim under the head of improvements, the value of trees of spontaneous growth.

In suits to redeem land demised on kánam tenure, on payment of the value of improvements, the costs of the adjudication necessitated by the refusal of either party to accept the terms of compensation offered or demanded by his opponent should, when those terms are reasonable, be charged on the party refusing.

THESE were appeals from the decrees of C. Rámáchandra Ayyar, Subordinate Judge of South Malabar, modifying the decree of B. Kamáran Náyar, District Múnsif of Temelprom, in suit 811 of 1881.

The plaintiff, Kirangat Manakel Náráyanan Nambudripád, sued Ananda Náráyana Bhatta and six others to recover certain lands demised on kánam tenure, and Rs. 1,052-9-10, rent in arrears, with interest, and future rent, on payment to defendant No. 1 of the kánam amount, and the value of improvements. Defendant No. 1 pleaded that the plaintiff had been paid renewal fees, and had promised to renew the kánam. The District Múnsif held that the document (ex. XIII) evidencing the promise to renew was not admissible in evidence, not having been registered. As to improvements, the District Múnsif found that defendant No. 1 was entitled to Rs. 4,650-1-0, and decreed redemption accordingly. Both plaintiff and defendant No. 1 appealed against this decree.

The Subordinate Judge held that, although ex. XIII did not

* Second Appeals 1095 and 1166 of 1883.

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require registration, being merely a receipt coupled with a promise to account for the money at the time of renewal, no promise to renew was proved.

NÁRÁYANA v. NÁRÁYANA.

As to improvements, the amount was reduced by about Rs. 2,000.

Both plaintiff and defendant No. 1 appealed to the High Court.

The facts necessary for the purpose of this report appear from the judgment of the Court (Turner, C.J., and Hutchins, J.).

Sankara Menon and *Gopála Náyar* for appellant.

Mr. *Shephard* for respondent.

TURNER, C.J.—We propose to dispose of both appeals in one judgment.

Plaintiff brought this suit to redeem 23 items of property originally demised on kánam in 1792. The kánam was from time to time renewed, the last occasion being in 1874. When the kánam was originally granted, the estimated area of culturable land was 102 paras (*a*) which was then expressed to be land "sowing 90 paras." In 1864 the extent was estimated at land "sowing 239 paras," and the extent of culturable land is now land sowing 61 paras, in addition to that which had been brought under the plough at the time of the renewal in 1874. The plaintiff also claims an arrear of rent.

The defendant pleads that there was an agreement to renew the kánam, and that he had paid the sum of Rs. 800 for this and other lands on account of renewal fees. He asserts that he had tendered the rent due, and that the value at which the paddy is estimated by the plaintiff is excessive.

It having become, in the judgment of the Court of First Instance and the Appellate Court, necessary to determine what sum was due to the defendant for improvements, those Courts have arrived at conclusions which are contested by both parties before us and which will be severally dealt with hereafter.

We regret that we are obliged to express the opinion that the principal issues have been too imperfectly investigated by the Lower Appellate Court.

(*a*) (1) A grain measure = 40 lb. avoirdupois.

(2) The amount of seed-corn required to sow 6,400 to 9,600 square feet of land—*Wilson*.

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NÁRÁYANA v. NÁRÁYANA.

First, as to the alleged agreement for renewal. Ex. XIII, which the Múnsif declined to admit in evidence, is, in our judgment, a mere agreement to repay or allow the sum entered in the document, and, being of this nature, it was clearly admissible in evidence. The importance of it in this case is that, in prescribing the time when the sum, of which the receipt is acknowledged, was to be paid or accounted for, reference is made to the time of renewal.

If this document stood alone, we are not prepared to say that it would compel us to the conclusion that an agreement for renewal existed, for, according to the custom of the country, kánams must on their expiry be discharged or renewed, and the term might have been used in a vague sense, indicating merely the period when accounts would be taken between the jenmi and the kánamdár. But the document must not be considered alone, but in connection with the surrounding circumstances. In the first place, it was given after the expiry of the last renewed term. That term expired in 1876, and the date of the document is 1879. There was, therefore, no future time at which the kánam would be renewed by reason of its expiry. The parties were, at the time the document was made, standing in the relation of a jenmi who had a right to resume and of a kánamdár who was bound to resign the holding if the jenmi did not renew. The position of the parties has a material bearing in considering how far the mention of the time of renewal in ex. XIII is evidence of the subsistence at the time of an agreement to renew.

At the same time it is admitted that the sum of Rs. 800 was not paid as the renewal fee for any particular kánam, but generally on account of the renewal fees to be collected on a number of kánams held by the kánamdár from the same jenmi, and, having regard to this circumstance, possibly all that could be safely inferred from the receipt would be that there was at that time no intention to refuse a renewal. For proof of the alleged agreement to renew, it is then the oral evidence on which the kánamdár must principally rely, and to this the Subordinate Judge has not adverted. This evidence is given by the person who collected the money on behalf of the jenmi, and who was at the time the kariastan of the jenmi. He has distinctly proved, if his testimony is reliable, that an agreement to renew was made. He has asserted that he has

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entered the sum as received on account of renewal fees in the account books of the jenmi, and those books are not produced to contradict it.

The second witness for the defendant corroborates the evidence of the kariastan that a renewal was promised by the jenmi. It cannot be said that this issue has been satisfactorily tried until due consideration is given to this evidence.

It is further noticeable in determining this issue that no provision was made in ex. XIII for payment of interest on the Rs. 800 then taken. If that sum was advanced as a loan to be repaid at a future time, it is inconceivable that there should have been no provision that at least the same interest should have been paid on it as was paid upon the sums which were due on kánam by the jenmi to the kánamdár. If there were no other kánams which had expired or were about to expire when the payment of the Rs. 800 was made, it is permissible to infer that the promise of repayment or allowance had in view at least the probability that the kánam which had expired would be renewed.

As to the rent, the Subordinate Judge failed to dispose of the fifth issue as to the rate at which the paddy was to be paid for. The Subordinate Judge has assumed the rate was admitted. It may have been so orally, but there is no record of the admission. If it becomes necessary to inquire what sum should be paid by way of compensation for improvements, we desire to point out the following objections which have been successfully maintained to the finding of the Subordinate Judge. The evidence on the record shows that the lands brought under cultivation were of different classes and required a different rate of expenditure, and we cannot say that the action of the Subordinate Judge in allowing a uniform rate all round is less arbitrary than the action of the Commissioners which he has impeached. So far as is possible, some support should have been sought by the Subordinate Judge for the conclusions at which he arrived from the recorded evidence as to the outlay necessary to bring the lands according to their several qualities into their present state of improvement.

A yet more important question is as to the area of land on which the improvement should be allowed. The jenmi complains that the Subordinate Judge has assumed that the whole area of land beyond that included in the original kánam has from time

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to time been improved without any allowance being made for the value of improvements at the time of renewal.

This Court in *Muppanagári Náráyanan Náyar* v. *Virupatchan Nambúdripád*(1) laid down what we conceive to be the true principle upon which such a question as this should in the present day be determined.

It was, we believe, the usage in Malabar that account should be taken of the improvements at the end of the term of kánam, and that the value should be added to the kánam if it was not at once discharged by payment. This usage was most convenient, for it enabled the parties, within a reasonable time after they had been made, to determine what amount ought fairly to be allowed to the kánamdár for his labor and expenditure. The usage has, however, in course of time been greatly departed from, and in many instances a renewal has been granted, leaving the account between the parties respecting the value of improvements still undetermined. It may be that the Subordinate Judge has come to a right conclusion in this case in allowing improvements on the whole area claimed by the kánamdár. The circumstance that nothing was paid for improvements in 1864 suggests that those improvements have not yet been taken account of. At the same time it is urged in this Court that those improvements may have dated from even an earlier period of renewal; in regard to some of them it is asserted they have done so. The increase in the porapad (rent) appears to be explained by the circumstance that a larger area of land had been rendered culturable, and it does not necessarily follow that the increased porapad was an admission that the landlord had satisfied the kánamdár's claim in respect of improvements which had increased the area. The Subordinate Judge has not, however, tried this issue, and in the retrial which we propose to order it will be necessary for him to do so, if his decision on the issue as to the agreement for a renewal is unfavorable to the kánamdár.

As to the claim for the value of trees of spontaneous growth, we are not aware that the law of Malabar recognizes in a kánamdár any right to compensation on this account, and it has been expressly disallowed in a decision of this Court to which reference

(1) I.L.R., 4 Mad., 287.

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is made by the Subordinate Judge. We are not prepared to dissent from that ruling.

We notice that the Subordinate Judge failed to allow the kánamdár any part of the Rs. 800 which unquestionably he paid. If it be found there was no agreement to renew, it should be ascertained whether some portion of the Rs. 800 is not to be allowed in this suit to the tenant before he can be called upon to surrender his land. It is admitted, as we have already mentioned, that the sum was not paid for the renewal of any specific kánam, but generally on account of the kánams which the defendant held, and the Subordinate Judge will have to ascertain whether in whole or in part it has been appropriated to renewal fees due on kánams other than the one now in question.

With these observations we shall set aside the decree and direct a rehearing of the appeals.

The Court of First Instance awarded costs to the defendant, considering that he had been hardly treated by the jenmi.

The Subordinate Judge directed each party to bear his own costs.

Ordinarily, a mortgagor who comes into Court offering to pay less than is due for the purpose of redemption should bear the cost in the suit for redemption.

In Malabar the extremely difficult question of compensation for improvements necessitates in many cases resort to the Court. We are unwilling to lay down, therefore, any general rule in cases where the question as to liability for costs must depend upon the conclusion at which the Court may arrive on many complicated issues. If the offer of the plaintiff is reasonably approximate, if the defendant's demands are reasonably moderate, the one or other should be charged with the costs of the adjudication necessitated by his refusal to accept the terms offered or demanded by his opponent.

The costs of these appeals will abide and follow the result.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. September 8. 1885. January 14.

Post. 304.
17 Bom. 696.
11 Mad. 131.
[illegible]
32 Bom. 75
55. Cal. 918

NÁRASIMHA (PLAINTIFF), APPELLANT,

and

VENKATADRI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindú law—Widow—Alienation—Movable property.

The restriction placed by the Hindú law on a widow's power of alienation of her husband's estate extends to movable as well as immovable property.

THIS was an appeal from the decree of L. A. Campbell, District Judge of Nellore, in Suit 12 of 1882.

The facts necessary for the purpose of this report appear from the judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.).

Visvanátha Ayyar for appellant.

Gurumúrti Ayyar and *Sadásiva Ayyar* for respondent No. 1.

JUDGMENT:—The appellant, Nárasimha, had a sister named Subbamma, who died childless on the 3rd January 1882. About ten days before her death, as alleged by the appellant, she gave away her property to him and placed it in his possession. It consists of movable property of considerable value, and also of some immovable property, both having devolved on her by right of inheritance upon the death of her husband, Pabbisetti Chinna Subbaiya, about eight years ago. Pabbisetti Venkatadri, respondent No. 1, claimed to be his reversioner, and Pabbisetti Pedda Subbaiya respondent No. 2, to be his adopted son. Both these impugned the gift set up by the appellant as being not true and valid. Respondent No. 1 denied also that a boat, which the appellant claimed as part of Subbamma's property, was in his possession, and contended that no declaratory suit could be maintained. In proof of the alleged gift, the appellant produced five witnesses, three of whom are his relatives, and they deposed to a gift from Subbamma to all her brothers including the appellant. The Judge considered

* Appeal 44 of 1884.

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that he was not called upon to determine the preliminary question whether the appellant could maintain a suit for a mere declaration of his title, because his predecessors settled the issues and no issue was framed with reference to the preliminary objection. As to the alleged gift, he observed that the appellant's own witnesses deposed to a gift jointly to him and his brothers, and that a gift by a childless widow, whether of movable or immovable property inherited from her husband, was bad in law. As regards the adoption of respondent No. 2, he held in Suit No. 28 of 1882 on his file that it was not proved. He dismissed this suit with costs on the ground that the appellant did not establish his title. It is contended on appeal among other things that, under the Mitákshará law, the gift ought to be upheld, at least so far as it relates to movable property. We took time to consider what weight was due to this contention, and we are of opinion that it cannot be supported. The rulings of the late Sadr Court of Madras were noticed by the Privy Council in *Bhugwandeen Doobey* v. *Myna Baee*, (1) and doubt was thrown on the correctness of the pandits' opinion on which they proceeded. The text of Kátyayána, from which a restriction on the widow's power of alienation over the property inherited from her husband is ordinarily deduced, is cited by all the commentaries of authority in this Presidency. It appears in Colebrooke's Digest, bk. V, ch. IX, v. 477, and is as follows:—

"What a woman has received as a gift from her husband, she may dispose of at her pleasure after his death, if it be movable, but so long as he lives, let her preserve it with frugality, or she may commit it to his family.

"2. The childless widow, preserving inviolate the bed of her lord and strictly obedient to her spiritual parents, may frugally enjoy the estate until she die: after her, the legal heirs shall take it."

The question is whether the second paragraph of this text refers to immovable property only, or to movable as well as immovable property. In Smriti Chandriká, ch. XI, s. i., sloka 28, the commentator refers to a text of Brahaspati which says:—"After the death of the husband, the widow preserving the honor of the family shall obtain the share of her husband so long as she lives, but she

(1) 11 M.I.A., 508.

NÁRASIMHA v. VENKATADRI.

has not property therein to the extent of gift, mortgage or sale." This text has evidently reference to movable property inherited from her husband, for, in the preceding paragraph, Brahaspati is cited as saying that a widow is incompetent to inherit at all immovable property. After thus denying the widow's power of alienation generally, the commentator proceeds to allude to a text of Prajápati cited in sloka 20 as authorizing a gift for religious and charitable purposes. The doctrine of Smriti Chandriká then is that a widow is incompetent to inherit immovable property from her husband, unless she has a daughter, that whatever property she inherits, she is not competent to alienate by gift, mortgage or sale, except for religious or charitable purposes.

The author of the Sarasváti Vilása cites in slokas 516 and 521, two texts of Kátyáyana and treats them in sloka 532 as forbidding the alienation of both movable and immovable property.

(516.) When her husband is dead, she who upholds the family shall receive her husband's share; her proprietorship is for her lifetime in gift, mortgage or sale.

(521.) The sonless wife who guards her husband's bed and is steadfast in her continence and docile shall have possession until her death; after her, the heirs shall have it.

In Vyavahára Mayukha, ch. IV, s. viii, sloka 4, Kátyáyana's text is expressly stated as applying to movable and immovable property.

In Madhaviya, s. 43, the commentator refers to the text of Kátyáyana as warranting the succession of the widow, and in s. 44 he refers to the text of Brahaspati, which prohibits the wife from taking immovable property, and interprets it, in order that it may not be inconsistent with the text of Kátyáyana, as prohibitory of the widow selling or making away with immovable property without the consent of the other heirs. He does not, however, consider whether the text of Kátyáyana forbids the alienation of movable property for other than religious or charitable purposes.

Thus, most of the leading commentaries in this Presidency warrant the inference that the restriction, which is placed on the widow's power of alienation over property inherited from her husband, extends to movable as well as immovable property.

Both in Dáyabhága, ch. XI, s. i., slokas 56, 60, 63, 64, and Dáyakrama Sangraha, ch. I, s. ii, the same view is taken. There is, however, this distinction between the Bengal school and the Mitákshará school; according to the former, a mere use of the husband's property is given to the widow with a special power to

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mortgage or sell. A passage from the Dhána Dharma of Mahábhárata is cited in both the Dáyabhága and Dáyakrama Sangraha to the effect that "for women, the heritage of their husbands is applicable to use. Let not women on any account make waste of their husbands' wealth." According to the Mitákshará, the analogy of the law of partition is applied to the widow's estate (ch. II, s. i,), and in Smriti Chandriká, ch. XI, s. i, sloka 19, a text of Vridha Manu is cited as showing that, by marriage, the wedded wife acquires ownership, though of a dependent character, over the entire property of her husband, and that, after his demise, she acquires independent power over it. The Mitákshará doctrine seems to be that the widow has a complete vested ownership as contradistinguished from a mere right to use, though her power over it to make a gift or sale at her pleasure is restricted by express texts. Hence those who considered the text of Kátyáyana to be applicable only to immovable property doubted whether the widow was precluded from alienating movable property. Having regard, however, to the extent to which the widow's power of disposition is treated, as restricted in the leading commentaries in the South, there appears to be little or no difference in the result. Hence the Judicial Committee observed, in *The Collector of Masulipatam* v. *Kavali Vencata Naranappa*(1), that the restrictions on the widow's power of alienation are of the very substance of her heritage. Assuming for a moment that she has a larger power over movable than immovable property, it can by no means be larger than that possessed by the father of a Hindú family under the text of Yájnyavalkya cited in Mitákshará, ch. I, s. i, sloka 27. It is observed by Mr. Mayne in s. 229 that the power must generally be taken to be limited to such necessary or suitable purposes as would come within the ordinary power of the head of a household. We should prefer to say that the nature of movable property being such that in many cases conversion is essential to its enjoyment, the widow is not precluded from converting it, but must preserve the capital, unless the expenditure of it is necessitated by the insufficiency of the income to provide for her maintenance subject, nevertheless, to a power to dispose of a moderate portion for works of piety. She is not bound to preserve the

(1) 8 M.I.A., 529.

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NÁRASIMHA v. VENKATADRI.

income, but, owing to her temporary ownership, has a disposing power over it. She may either expend it at her pleasure or may allow it to fall into, and become part of, her husband's estate, and where she has not made any disposition of the savings of income, they will become part of the husband's estate. The allegation that any portion of the property in suit was acquired out of income, was made for the first time in appeal and is inconsistent with the averment in the plaint. We need not, therefore, consider whether, if she makes savings, it is to be presumed, in the absence of proof of a contrary intention, that she has allowed them to fall into, and become part of, the *corpus*. We are, therefore, of opinion that, even if the gift set up by the appellant were proved as alleged, the appeal must fail. The appellant must pay the costs of respondent No. 1.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

1885. February 12.

KONDADU

against

RÁMUDU AND ANOTHER.*

Act XIII of 1859, *s.* 2—*Advance of grain and money—Order to repay value of work not performed.*

An advance of money and grain having been made to a labourer for work to be done, the labourer failed to complete the work, and an order was passed by a magistrate, under s. 2 of Act XIII of 1859, directing repayment of the balance of the advance not worked off by the labourer:

Held that, as it was not proved that the labourer was offered and accepted the grain in lieu of money to be advanced, the order was illegal.

THIS was a case referred under s. 438 of the Code of Criminal Procedure for the orders of the High Court by J. Grose, District Magistrate of Nellore, on the 21st of October 1884. The facts were as follows:—

Tammisetti Rámudu and Pasupulati Laksminárasu were prosecuted by Vuppu Kondadu, a contractor engaged on the Sungum project, under Act XIII of 1859, for criminal breach of contract.

* Criminal Revision Case 655 of 1884.

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The Second-class Magistrate at Sungum found that the complainant had advanced Rs. 54-10-2 to the accused for work to be done, and that, after completing a portion of the work valued at Rs. 27-3-11, the accused had deserted the work. The accused were ordered to repay to the complainant Rs. 27-6-3, and Rs. 2 on account of process fees. Against this order an appeal was made to the Special Deputy Magistrate of Nellore. He found that the advance was made partly in grain and partly in cash, Rs. 28-9-6 being the cash payment, and held that although the Act only referred to advances of money, yet that in this case the grain was received as money, the value having been settled at the time the advance was made.

The appeal was dismissed; but at the request of the Deputy Magistrate the case was referred to the High Court as there were several similar cases pending.

Mr. *Wedderburn*, for the accused, referred to *Reg.* v. *Jethyávalad Vestya*,(1) and contended that s. 2 of Act XIII of 1859 being a penal enactment, must be construed strictly.

The Court (Muttusámi Ayyar and Brandt, JJ.) delivered the following

JUDGMENT:—There was an advance in money, but the whole of the money agreed to be advanced was not paid in cash, but part in cash and part in grain.

Where an employer of labour offers the advance in money and the person employed asks to have part of the advance in grain as the equivalent of money, we consider that there would be sufficient compliance with the requirements of the Act, seeing that the advance may in such case be treated as an advance in money, part of which was in fact exchanged for grain supplied by the employer at the request of the labourer; but where the facts of the case do not warrant such an inference, we should consider ourselves bound to adhere to a strict interpretation of the Act, which is of a penal character.

As analogous cases, we would refer to rulings of this Court in which it has been held that orders for maintenance in which it is directed that grain be delivered or cloths provided cannot be

(1) 9 Bom.H.C.R., 171.

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KONDADU v. RÁMUDU.

supported under the provisions of s. 488 of the Code of Criminal Procedure.

In the case before us there is not sufficient evidence to justify us in holding that there was an actual offer by the employer of money equivalent to the grain accepted in advance.

We must therefore quash so much of the order of the Sub-Magistrate as directed the accused to refund the equivalent of the grain advanced.

APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

1885. February 23.

10 Bom. 131.
15 Cal. 608.
36 Mad 308
18 Cwn 723
40 Bom 97

QUEEN-EMPRESS against ERRAMREDDI AND OTHERS.*

Criminal Procedure Code, ss. 403, 437—Different charges arising out of same transaction—Acquittal—Further inquiry—Re-trial.

E being charged with theft and mischief, in respect of certain branches cut from a tree claimed by the complainant, was tried by a Subordinate Magistrate on the charge of mischief and acquitted on the ground that, as against the complainant, E had title to the tree. On the application of the complainant, the District Magistrate directed further inquiry into the case under s. 437 of the Code of Criminal Procedure, and on a reference to the Court of Session, the Sessions Judge held that, as no inquiry into the charge of theft had been held, the order was legal:

Held, that the District Magistrate had no power to pass such an order under s. 437, and that a trial on the charge of theft was barred by virtue of s. 403 of the Code of Criminal Procedure.

THIS was an application to the High Court under ss. 435 and 439 of the Code of Criminal Procedure to set aside an order of the District Magistrate of Cuddapah, directing, under s. 437 of the Code of Criminal Procedure, further evidence to be taken in calendar case, No. 168 of 1884, on the file of the Second-class Magistrate of Kamalapúr, and to direct stay of proceedings in the said case before the Head Assistant Magistrate of Cuddapah.

The facts appear sufficiently for the purpose of this report, from the judgment of the Court (Brandt, J.).

Mr. *Powell* for petitioners.

BRANDT, J.—The petitioners, Dasari Erramreddi and seven

* Revision Case 52 of 1885.

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others, were charged, in a complaint laid before the Sub-Magistrate of Kamalapúr by one Bálá Subbareddi, with theft and mischief in respect of the boughs or loppings cut from a tree which the complainant said was his.

The petitioners were, it appears, tried on a charge of mischief only, and were acquitted under s. 245 of the Code of Criminal Procedure, on the ground that the petitioner No. 1 had title to the tree as against the complainant.

The complainant then applied to the District Magistrate to order an appeal to be preferred to the High Court, but the District Magistrate, under s. 437 of the Code of Criminal Procedure, directed further inquiry to be made by the Taluk Magistrate of Cuddapah on the ground that it appeared "this (*i.e.*, the questions, whether the tree belonged to the petitioner No. 1, or to the complainant, or to Government, and whether the accused has acted dishonestly or mischievously ?) was a matter which it should not be left to a private individual to prosecute, as the question is whether the tree was not in Government porumboke and useful to the public."

From the petition presented by the accused Erramreddi to the Sessions Court, it would seem that, on objection taken by the accused before the Taluk Magistrate that they could not again be tried in respect of a complaint imputing offences of which they had been previously acquitted, and that the District Magistrate had no authority to direct "further inquiry" in a case of acquittal, the Taluk Magistrate made a reference to the Deputy Magistrate, who is represented as having directed that the accused should be tried (or re-tried ?) for theft only, "as the Sub-Magistrate appeared to have acquitted them of mischief only in the case disposed of by him." This order of the Deputy (Divisional ?) Magistrate the petitioners moved the Sessions Judge to refer to this Court as illegal.

The Sessions Judge, however, considered the proceedings of the Deputy Magistrate to be "strictly legal," on the ground that "no charge of theft was inquired into, but one of mischief only;" at the same time the Judge suggested that, on reconsideration, the District Magistrate might see reason to order "further inquiry" to be made by the Head Assistant Magistrate and not by a Second-class Magistrate.

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QUEEN EMPRESS v. ERRAMREDDI.

It does not appear what authority the Deputy Magistrate had to explain or to pass orders in respect of the District Magistrate's order.

In the next place the District Magistrate's order does not profess to show that any further or other evidence was forthcoming, in addition to that already recorded by the Sub-Magistrate; it does not even profess to show that the evidence recorded had not been fully and fairly considered by the Court of First Instance; and lastly he does not appear to have noticed that power to direct further inquiry under s. 437 is limited to cases in which an accused person has been discharged, and does not apply at all in a case in which an accused person has been acquitted.

It remained for the Deputy Magistrate to put upon the District Magistrate's order the gloss which the Sessions Judge holds to be strictly legal.

It would be almost sufficient to say that the District Magistrate's order was clearly not passed upon the ground on which the Deputy Magistrate suggested that it might be acted on, but on the assumption that it might possibly be proved that the tree belonged to Government, which was not the case for the complainant at all, in the first instance (in his complaint he says it "belonged to him and was in his enjoyment;"), but it may be as well to point out, first, that if the District Magistrate intended to institute wholly new proceedings against the accused on behalf of Government as prosecutor, he could not do this under s. 437 at all events; secondly, that the District Magistrate's order cannot be supported on the ground suggested by the Deputy Magistrate, and approved by the Sessions Judge.

Section 403 of the Criminal Procedure Code provides that a person who has once been tried by a Court of competent jurisdiction for an offence and . . . acquitted of such offence, shall, while such . . . acquittal remains in force, not be liable to be tried again for the same offence *nor on the same facts for any other offence for which a different charge from the one made against him might have been made under s.* 236, *or for which he might have been convicted under s.* 237.

It is clear that on the facts, if proved as laid by the complainant, the accused might have been convicted either of theft or of mischief, or of both, if it had been found (1) that the tree belonged

to the complainant, (2) that the accused cut branches off the tree with intent to cause, or knowing that he was likely to cause, wrongful loss or damage to the complainant, or (3) that he cut the tree with intent to cause wrongful loss to the complainant or wrongful gain to himself, or both.

And the charge of theft "might have been made" under s. 236; and why the Sub-Magistrate did not charge the accused with theft or mischief, or both, does not appear, and it does not appear how, if the evidence was not sufficient to prove mischief, it could support a charge of theft; the finding being, as it was, that the accused proved a good title to the tree as against the complainant, they could not "on the same facts" be convicted of theft on the complaint laid by the complainant. Clause 2 of s. 403 does not apply to this case because the imputed offences of mischief and theft were not distinct offences, nor was there a series of acts, but one act or transaction only, the cutting of the tree and removal of the branches cut.

The order of the District Magistrate is quashed.

It is further necessary to point out to the Session Judge and District Magistrate that the suggestion of the former that the "further inquiry" ordered by the District Magistrate should be conducted by a Magistrate, other than the Magistrate who held the original inquiry, as well as the order of the District Magistrate directing the further inquiry to be conducted by the Taluk Magistrate are open to objection in this respect also, that there can be little or no doubt that it was the intention of the legislature that the "futher inquiry" allowed under s. 437 should ordinarily be conducted by the Magistrate who first inquired into the case. This is pointed out in an order of this Court which will probably be published shortly, in which, however, it is observed that, in case of the death or removal of such Magistrate, or for other similar cause, it may be that further inquiry might be conducted by another Magistrate, but that the rule is as above stated. The question—What the words "further inquiry" mean in s. 437—is there fully discussed, and need not therefore be gone into further in this case.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. October 20.

10 All. 223. 13 Bom. 22. 24 Mad. 666. 26 do. 234.

ÁTHIAPPA (PETITIONER), APPELLANT,

and

AYANNA (PETITIONER), RESPONDENT.*

Civil Procedure Code, ss. 32, 368—Death of respondent in appeal—Rival claims to represent deceased.

Although a Court is bound by s. 368 of the Code of Civil Procedure to place on the record the name of the person alleged by the appellant to be the legal representative of a deceased respondent, nevertheless, where a person, other than the person alleged by the appellant to be such representative, claims, on good *primâ facie* grounds, to be the representative of the deceased respondent, and the interests of the person entitled to the estate of the deceased may be prejudiced, the Court should, under s. 32 of the Code of Civil Procedure, proceed to make such claimant also a party to the appeal.

IN a suit filed in the Subordinate Judge's Court, South Tanjore, Lakshmimathi Ammál, the widow of Rámásámi Mudali, sued to recover the estate of her husband, valued at Rs. 80,457-1-11, and obtained a decree for the greater portion of her claim.

Against this decree, appeal No. 47 of 1882 was filed by defendants Nos. 1, 2, and 4 who claimed property of the value of Rs. 74,289.

A memorandum of objections under s. 561 of the Code of Civil Procedure was filed by Lakshmimathi Ammál, and also a petition (No. 122 of 1883) to amend the plaint and decree.

On the 27th and 28th August 1883 the appeal was heard and judgment was reserved, and on the 31st August, judgment not having been pronounced, the respondent died.

The appellants having applied to the Court under s. 368 of the Code of Civil Procedure to make one Ayanna Nainar respondent, alleging that he was the legal representative of the deceased, an order was passed by Kernan J., on the 23rd October 1883, directing that Ayanna Nainar should be entered on the record

* Letters Patent Appeal 15 of 1883.

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respondent. At the same time two applications made by one [Át]hiappa Mudali, who also claimed to be the legal representative [of] the deceased and to be made respondent in order to support [(1)] the memorandum of objections and (2) the petition to amend [the] decree, were rejected by Kernan J. ÁTHIAPPA v. AYANNA.

Against these orders Áthiappa Mudali appealed under s. 15 [of] the Letters Patent. With this appeal was heard a petition by [Ay]anna Nainar, in which he objected to the claim of Áthiappa [Mu]dali to represent the deceased respondent.

The facts and arguments necessary for the purpose of this [re]port appear from the judgment of the Court (Turner, C.J., and [Mu]ttusámi Ayyar, J.)

Bháshyam Ayyangár for Áthiappa Mudali.

Mr. *Norton* for Ayanna Nainar.

TURNER, C.J.—The original respondent, Lakshmimathi Ammál, [afte]r having presented an objection to the decree of the Court of [Fir]st Instance and filed a miscellaneous petition No. 122 of 1883, [pra]ying for the correction of the plaint and of the decree, died [bef]ore judgment was pronounced. One Ayanna Nainar, who [cla]ims to be a distant sapinda of the deceased Rámásámi Mudali [an]d entitled to succeed to Rámásámi's estate as reversioner on the [wid]ow's death, was named as her representative for the purpose [of] this appeal by the appellants, and has himself presented an [app]lication to be admitted a party to the record in that character. [He] does not support either the memorandum of objections or the [pet]ition for the amendment of the decree.

A petition, 567 of 1883, was filed on behalf of Áthiappa Mudali, [a m]inor, by Janadasa Mudali, in which it was alleged that the [min]or had been adopted by the deceased respondent who had [dev]ised to him a considerable portion of her property, and applica[tion] was made that the minor's name should be substituted for [tha]t of the original respondent and be represented by Janadasa as [his] guardian *ad litem* to support the memorandum of objections [an]d in the appeal.

Another petition (566 of 1883) presented by the same person [also] on behalf of the minor Áthiappa Mudali, prayed that the [min]or's name might be substituted for that of Lakshmimathi [Am]mál in miscellaneous petition No. 122 of 1883, for the correc[tion] of the decree.

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In civil miscellaneous petition No. 568 of 1883, the minor, by his guardian Janadasa Mudali, represented to the Court that a statement made by the appellants in their application for the admission of Ayanna as representative of Lakshmimathi Ammál to the effect that that lady had died without issue was false, inasmuch as she had adopted the petitioner on 20th August 1883 and appointed Janadasa his guardian.

It was denied that Ayanna was a sapinda of Rámásámi Mudali and a reversioner, and it was asserted that the appellants had added him as a party collusively.

It will be seen that the petitions 566 and 567 of 1883 filed on behalf of the minor did not ask simply that he should be made a respondent to the appeal, but that he should take the place of the deceased respondent in order to support the memorandum of objections and the miscellaneous petition filed by her.

This may have been suggested by the ruling of the High Court of Bombay in *Lakshmibái* v. *Bálkrishna*,(1) that an appellant is at liberty to bring on the record any party he pleases as representative of a deceased respondent, and that no other person can be brought on the record in that character against his wishes.

The learned Judge to whom the petitions 566 and 567 were presented in the Admission Court rejected them, because Ayanna Nainar had already been made a respondent.

An appeal has been presented against the order of the learned Judge. It is urged that inasmuch as the law allows a cross-appeal to be filed in the form of a memorandum of objections, the rightful representative of a deceased respondent has a right to apply to be made a party in the stead of the respondent deceased in order to support the objections, although he may not have been the person indicated by the appellant as the representative of the deceased.

While we agree with the learned Judges of the High Court of Bombay that the Court must place on the record the person indicated as the representative of a deceased respondent, we are not prepared to say that in no case can the Court place on the record any other person as filling that character. The Court has the same power to make parties to an appeal as it has to make parties

(1) I.L.R., 4. Bom., 654.

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to a suit; and where there appears a substantial doubt whether the person indicated by an appellant is the representative of a deceased respondent or a representative for all purposes connected with the matters in litigation, and a person other than the person indicated by the appellant lays claim to the representative character and on good *primâ facie* grounds, and where, if he be not allowed to join, the interests of the person entitled to the estate of the deceased may be prejudiced, we consider the Court ought to proceed under s. 32 to make him a party to the appeal. In this case Ayanna Nainar represents the estate of Rámásámi, and the right of suit in respect of certain of the properties may, on the death of Lakshmimathi have survived to him, if he is, as he asserts, the nearest sapinda. On the other hand the appellant Áthiappa is recognized by the will of Lakshmimathi as her adopted son; he is also a beneficiary under that instrument and is constituted by it her representative for the purposes of this suit. Assuming that the title of Ayanna Nainar should be established, the representative of Lakshmimathi would still have a claim at least for a part of the mesne profits in suit, and, although he would not be affected by the decree if he were not made a party to the appeal, he would lose the right of insisting by way of cross-appeal on the objections taken by the deceased Lakshmimathi under s. 561 of the Civil Procedure Code.

For these reasons, and without deciding on the rival claims of Ayanna and Áthiappa as representatives of the deceased in respect of the several causes of action in suit, we consider the Court was at liberty to make Áthiappa also a party as claiming to be a representative of the widow. He cannot, however, be made a party merely for the purpose of supporting the memorandum of objections. If he is brought on the record he must be made a party for all purposes, so as to be bound by the decree; and his next friend assenting to this course, we shall reverse the order of the Judge and direct that Áthiappa Mudali be made a party to the appeal as respondent, and that he be allowed to appear through Janadasa Mudali as his guardian.

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32 Bom. 75
34 C. L. J. 529
26 Cwn. 177
55 Cal. 918

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

1884.
October 13.
December 15.

BUCHI RÁMÁYYA (PLAINTIFF), APPELLANT,

and

JAGAPATHI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindú Law—Widow's estate—Alienation—Movables—Release by widow, Suit to set aside—Duress—Coercion—Fraud—Grounds on which relief is granted.

B. R., the widow of a zamíndár, having for valuable consideration released all her claims on her husband's estate in favor of V. S., her husband's brother, by a deed executed five days after the death of her husband, brought a suit against V. S. to set aside the deed of release on the ground that it was obtained by threats and fraud, and to recover the estate:

Held, that, it was not sufficient to find that the consent given by the plaintiff was not caused by coercion, as defined in the Indian Contract Act, nor by duress as known to the English Law; but that the questions to be decided were (1) whether undue advantage had been taken of the plaintiff's position; (2) whether the plaintiff had been sufficiently informed as to her rights or had proper advisers; (3) whether the contract was an unconscionable or "catching" bargain.

A Hindú widow is not at liberty to defeat the rights of reversioners by alienating or wasting movable property inherited from her husband.

THIS was an appeal from the decree of K. Krishnasámi Ráu, Subordinate Judge of Cocanada, dismissing a suit brought by Sri Rájá Vatsavayya Buchi Rámáyya Gáru, widow of the late zamíndár of Túni, against his brother, Sri Rájá Vatsavayya Venkata Simhadri Jagapathi Rázu Bahádur Gáru, zamíndár of Túni, and two others to recover an estate, valued at Rs. 7,36,882.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (Turner, C.J., and Brandt, J.)

The Advocate-General (Hon. *P. O'Sullivan*) and *Bháshyam Ayyangár* for appellant.

Mr. *Tarrant* and Hon. *Rámá Ráu* for respondents.

JUDGMENT.—The Kottam estate was created in 1810. A claim had been advanced by the grand-father of defendant No. 1 to the

* Appeal 76 of 1883.

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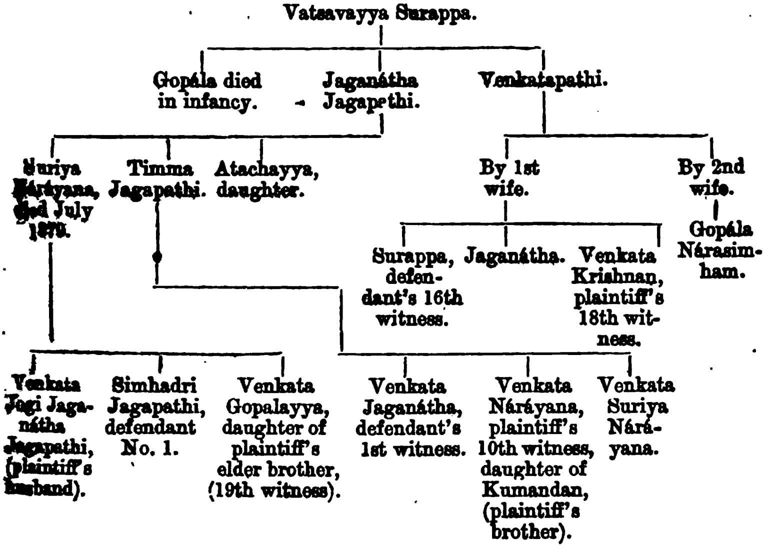
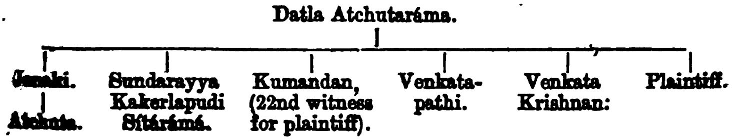
zamíndárí of Peddapúr, and in settlement of that claim, when the suit was under appeal to the Sadr Adálat, the taluk of Kottam was severed from the zamíndárí and made over to Vatsavayya Surappa Rázu.

In order to understand the position and relationship of some of the persons to whom reference will be made in the course of this judgment, it is desirable to set out two pedigrees, which have been furnished to us during the argument.

Pedigree of the Kottam Family.



Pedigree of Plaintiff's Family.



In 1838 Suriya Náráyana was recognized as the proprietor of the Kottam mitta on the death of his father, Jagapathi; he soon afterwards succeeded also to the Peddapúr zamíndárí, but the latter estate was held but a short time by him when it was sold for arrears of Government revenue.

The right of Suriya Náráyana to succeed to the mitta as impartible was disputed by his uncle, Venkatapathi, who unsuccess-

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fully attempted to be allowed to sue as a pauper to vindicate his claim.

On the death of Venkatapathi, his sons by his first wife entered into a karár (agreement) with Suriya Náráyana (exhibit XXXIII), by which they admitted the impartibility of the estate and accepted an allotment of land on a fixed rent in satisfaction of all their claims on the Peddapúr and Kottam estates. Their half-brother, Gopála Nárasimham, instituted a suit against Suriya Náráyana claiming one-eighth of the estate of Kottam, but on appeal his claim was over-ruled on grounds which are hardly satisfactory (exhibit XL).

Suriya Náráyana had previously made an arrangement with his brother, Timma Jagapathi, for his maintenance and that of his family, and consequently, after the dismissal of Gopála Nárasimham's suit, he retained sole and undisputed possession of the mitta. He appears to have been a man of prudence and capacity; he saved money which he invested on loans and other speculations; and kept regular accounts of his transactions. He lived on good terms with his eldest son, plaintiff's late husband, and made a handsome provision for his daughter and her son. During the later years of his life, he was, however, displeased with his second son, defendant No. 1, who consequently left his house and resided elsewhere.

Suriya Náráyana died in 1879, and his eldest son entered into possession of the mitta. Defendant No. 1 asserted that the mitta was partible and claimed an equal half share in the movable as well as the immovable property of his father. Eventually the brothers went to Cocanada and accepted the mediation of the District Múnsif, Rámachandra Ráo, who was examined by the Subordinate Judge as a witness in this case. In the course of negotiations, plaintiff's husband advanced a claim to a large sum of money, upwards of three lakhs of rupees, as a gift from his father. Defendant No. 1 disputed the fact that the gift had been made, and asserted that the whole of the money in the palace treasury, amounting to about six lakhs of rupees, was subject to partition. He has deposed, and his evidence on this point is in a measure supported by the Court witness, that he desired to see the accounts but they were not produced.

The Court witness allows that he proposed the settlement,

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which he effected and to which we shall presently allude, not on the basis of any investigation of the assets actually divisible, but rather with reference to the terms which the plaintiff's husband offered as the limit to which he would consent. These terms were somewhat more favourable to defendant No. 1 than the offer made by plaintiff's husband at his residence in Túni.

The terms recommended by the mediator were embodied in the document, exhibit A, dated 6th March 1880. This deed commences with the recital that the mitta is impartible, and records the stipulation that the estate should not be alienated by adoption. There can be no doubt that this stipulation was introduced at the instance of defendant No. 1 and in consideration of his abandoning his claim to a partition of the mitta. As regards this immovable property then it was the intention that the brothers should remain undivided, and that, on the death of the elder without male issue, possession should pass to defendant No. 1. There is nothing in the instrument to put an end to his co-ownership, and, on his brother's death, his right to possession would defeat the succession of the widow.

As to the ancestral movable property, it was agreed that, as representing his half share, the defendant No. 1 should receive Rs. 1,75,000 in cash, together with jewels valued at Rs. 20,000; and that out of the utensils, valued at Rs. 2,000, he should receive a fair moiety; that he should be relieved of any responsibility for the liabilities of the family; that the house in which he had been up to that time living, together with the premises and grounds appurtenant thereto, should be put in his permanent possession, together with a sum of Rs. 3,000 to enable him to erect other buildings thereon at his pleasure; and that a mango garden in the same village (Virávaram), valued at Rs. 2,000, should also be made over to him.

The sum of Rs. 50,000 was admittedly handed over to one Guruzada Venkata Krishnayya for payment to the defendant No. 1 in accordance with the terms of this agreement, but nothing further was done in pursuance of it; indeed it was conceded at the hearing of this appeal that defendant No. 1 refused to accept any further payment, and had, before his brother, the plaintiff's husband, died, on the 22nd August 1880, intimated his intention of litigating, if necessary, for a fresh partition on the ground that

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his brother had represented the cash, jewels and other movables at less than their real value, withholding accounts which would disclose the actual value, and that difficulties had been placed in his way of obtaining possession of the mango garden.

Exhibit XXV is a document, bearing date the 27th August 1880, admittedly executed by the plaintiff in this suit in favor of defendant No. 1. In this it is recited that, in consequence of the death of the plaintiff's husband on the 22nd instant, he having died issueless and being the undivided brother of defendant No. 1, and the registered partition deed, dated 6th March 1880, between the deceased and defendant No. 1 not having been acted upon during the life of plaintiff's husband, defendant No. 1 has become the sole heir to the whole of the immovable property constituting the Kottam zamíndárí, and to the whole of the movable property; that, having regard to these facts, the plaintiff relinquishes all right, title and claim to the aforesaid estate, and, according to the settlement made by mediators, has received from defendant No. 1 on account of her stridhánam, &c., 20,000 rupees' worth of jewels, and 1,75,000 rupees in cash, with power of absolute disposal, together with a house described, and valued at about 1,000 rupees, and a verandah, and fruit garden, the last-mentioned properties to be held and enjoyed without power of disposal by gift, mortgage, sale or otherwise, and that, in consideration of the premises, the plaintiff binds herself not to dispute or question the right of defendant No. 1, or his heirs, to the whole of the estate, movable and immovable. This document is signed by the plaintiff and attested by Brahmanna, son of Bavali Luchappa of Túni; Kámayya, son of M. Subbanna of Túni; Rámabadra Rázu, son M. Sitarámá Rázu, then at Túni; Gopalkrishnama, son of N. Venkatakrishna Rázu then at Túni, and signed by one Subbaráyadu, as writer.

It was registered at Túni on the 7th September 1880, and bears the Sub-Registrar's endorsement that it was presented for registration by the plaintiff (who again signed this endorsement) at the private dwelling-house of defendant No. 1.

Exhibit LX is a letter from the plaintiff to the Collector of the district, dated the 5th October 1880. This letter was not received in the Collector's office till the 17th idem. Túni is, we are informed, not more than forty miles distant from Cocanada, and the ordinary post does not take more than three days between the two

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[illegible]. This letter does not, however, appear to have been sent by her. The plaintiff in this communication informs the Collector of the death of her husband as having taken place on the 22nd August 1880, of the disputes between her late husband and his brother, defendant No. 1, and of the settlement of those disputes under the agreement of the 6th March 1880. She then goes on to say that, at the time of her husband's death, she being a female and having no competent male advisers near her, defendant No. 1 having won over to his side all the officers and servants who had been in her husband's employ, prevented for some hours the removal of her husband's corpse, and while she was overwhelmed with sorrow, frightened her in various ways, and by misrepresentation "as to the past state of things and to her right to the zamindári, hurriedly got certain documents written and signed by her;" that these documents were signed by her from fear of danger to her life, and not of her free will and consent, and that it would be apparent that she could not have voluntarily consented to the agreement evidenced by the document signed by her "when the former document was existing, and while her husband and his brother were divided," and at a time when her loss was so recent, and before the obsequies were over; that she left Túni and went to her own peoples' house at Chouduvada on the 15th September, lest some injury might be done to her. She prayed, therefore, that the Collector would not register her husband's brother as proprietor of the mitta, but that he would register her name, she being the legal heir. She explained the delay in sending a petition to this effect by saying she had been ill.

On the 14th April 1881, a suit was filed on behalf of the plaintiff against the present defendants, defendant No. 1 being plaintiff's brother-in-law, Vatsavayya Venkata Simhadri Jagapathi Rázu Gáru, and the defendants Nos. 2 and 3, Ponnada Markonda Rázu and Vempati Brahmayya Sástri; the two latter were impleaded as persons to whom her late husband had given powers-of-attorney to manage the whole of his affairs during his intended absence on a pilgrimage, which his death had prevented.

After setting out the agreement of the 6th March 1880, the plaintiff in her plaint alleged that monies given to her, her husband, and late son, from time to time during the lifetime of her father-in-law, were kept in the family chest, and invested without

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distinction, and shown in the accounts along with the funds taken possession of by her husband on the death of his father, and continued to be in his possession.

The cause of action against the defendants was then stated to be that, immediately on the death of her husband, the defendants Nos. 2 and 3 and others placed all the plaintiff's property in the possession of the defendant No. 1, and that "by threatening the plaintiff in many ways, while she was in deep sorrow" and by practising deceit and by fraudulent means obtained her signature to certain papers against her will, of which papers the agreement, bearing date the 27th August 1880, is the principal one and the basis of the rest; that this document is invalid in law, without consideration, and in contradiction to former facts, and that "according to Hindú Law, and under the consent of her husband, she is the rightful owner of the property of all kinds, with the profit thereof." The relief sought was recovery of the Kottam estate, including houses and grounds, and all other immovable property, with all rights pertaining thereto, together with mesne profits; secondly, cancellation of the "deed of release," dated the 27th August 1880; thirdly, recovery of cash amounting to Rs. 3,02,000, and jewels and other movables or their value, estimated at Rs. 77,840.

Defendant No. 1 objected that the suit was bad by reason of misjoinder, inasmuch as the plaintiff asserted claims based on different rights. He pleaded that the agreement of the 6th March 1880 did not operate to sever the coparcenary between himself and his brother; that the impartibility of the zamíndárí was recognized by the agreement; that, having discovered that he had been deceived by his brother as to the amount and value of the cash, jewels and movable property, he had called upon his brother, if it was his intention to put an end to the coparcenary, to make a fresh and equitable agreement in supersession of the agreement of the 6th March 1880; and, as his brother died before a new settlement could be made, he claimed that they were undivided as well in respect of the movable as of the immovable property of the family. He traversed the allegations of the plaintiff that the agreement of the 27th August 1880 had been procured by undue influence, or intimidation, and asserted that it had been executed by the plaintiff voluntarily, and that she had acted under competent advice, and

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with full knowledge of the circumstances. He denied that any gifts had been made by his father to the plaintiff's husband, the plaintiff, or her son, and the competency of his father to make such gifts; and he complained that the plaint did not show explicitly how much money was the subject of each of the gifts alleged, nor at what time such gifts were made.

Defendants Nos. 2 and 3 pleaded that the powers-of-attorney, though executed, were not handed over to them; that they did nothing in virtue of such powers; that they did not take possession of any of the plaintiff's husband's property; that they took no part in persuading the plaintiff to execute the documents signed by her at Táni; and that these were executed by plaintiff of her own free will and consent.

At the first hearing the plaintiff's vakíl set up a plea that the Kottam estate was partible; further that the cash and jewels payable and to be delivered under the document of the 27th August 1880, which it was admitted were duly received, were accepted not as a payment under that document, but in part satisfaction of plaintiff's claim. Issues were framed with reference to these as well as the other material averments.

The Subordinate Judge found on the issue as to whether the estate is partible or impartible, that the estate had, at all events ever since it was constituted a separate estate, been treated and regarded by the father of plaintiff's husband, by the plaintiff's husband and his brother as impartible; but that, in any case, the plaintiff is bound by the fact that her late husband in the agreement of the 6th March 1880 treated with his brother and dealt with the estate on the footing that it is impartible.

Upon the sixth issue, whether the release deed, dated 27th August 1880 and the receipt, dated the 7th September 1880, were obtained from the plaintiff by fraud, intimidation, misrepresentation, or undue influence? The Subordinate Judge after going carefully into the allegations and evidence on either side, came to the conclusion that it was not proved that actual force, violence or personal intimidation had been used towards the plaintiff; that it was not proved that by placing additional guards over the rooms in which plaintiff was living, or otherwise, communication between the plaintiff and her relatives was cut off; that there were good reasons why the plaintiff and her advisers should accept the settle-

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ment made; and that the agreement of the 27th August 1880 was executed by the plaintiff voluntarily and with a full knowledge of the facts.

The plaintiff appeals against the dismissal of her suit.

We consider that it is not material for the purposes of this suit to determine whether the Kottam mitta is partible or impartible; whether partible or impartible, the brothers being undivided in interest in respect of it, the defendant No. 1 would and did take the estate by survivorship. The agreement of the 6th March 1880 purports to operate as a partition between the brothers only in respect of the assets of the estate other than the mitta, and if that deed is binding upon the defendant No. 1 the plaintiff would be entitled to succeed to such portion of the property dealt with under that instrument as remained to her husband as his separate share of the ancestral estate other than the mitta, and to the wealth, if any, which he had obtained by gift, unless, by acceptance of the agreement evidenced by the instrument of the 27th August 1880, she has precluded herself from insisting on her rights of succession.

We propose then to consider in the first place whether that instrument is binding on the widow.

Execution of the instrument as well as of others, which we shall shortly notice, and acceptance of the full amount of cash and jewels payable thereunder is admitted by the plaintiff. We shall in the proper place consider whether the plaintiff's explanation of such acceptance is reasonable and credible. It is necessary to look not only at the circumstances under which the documents were actually signed and registered, and under which negotiations for the agreement were commenced and concluded, but to consider the position of affairs for some little time before the date of the plaintiff's husband's death.

The existence of a dispute between defendant No. 1 and his brother touching the succession to the mitta and the movables of the family is clearly shown. It is also shown that the agreement of the 6th March 1880 was not arrived at after a satisfactory ascertainment of the family property, and whether defendant No. 1 would have been held bound by it or not, there existed grounds on which he conceived himself at liberty to repudiate it, and he did repudiate it, and it was not completely executed when his brother died. Defendant No. 1 was examined as the plaintiff's seventh witness.

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He deposes that he saw his brother, plaintiff's husband, who appears to have been seriously unwell for some twenty days before he died, at Túni, whither he went from Cocanada on hearing of his brother's illness; and if this witness be believed, plaintiff's husband, a day or two before he died, questioned his brother as to his intention to bring a suit, and promised as soon as he got well "to look into the accounts and settle anything that might be found wrong with reference to the difference in respect of the movable property." Now this difference defendant No. 1 explains as follows: In settling the amount to be given to defendant No. 1 under exhibit XXV, the absence of all accounts showing the value of the movables to be divided had been commented on and plaintiff's husband promised to produce the accounts when they got to Túni. However this may be, it may be taken that, on some ground or other, defendant No. 1 thought he had reason to believe that property had been concealed, and it is a fact, deposed to by defendant No. 1 and not disproved or contradicted, that he was prevented by persons who had been connected with the plaintiff's husband from taking possession of the mango garden awarded to him under exhibit XXV. This prevention was, it seems, the result of some dispute as to the produce of the season.

At any rate the plaintiff's husband must be taken to have been aware that defendant No. 1 challenged the finality and validity of the deed of partition of the 6th March 1880; indeed, as the Subordinate Judge points out in para. 47 of his judgment, there is evidence that plaintiff's husband had reason to believe that defendant No. 1 was on the point of filing a suit for this purpose and that he deferred his pilgrimage to Benares on that account. The intention of the plaintiff to dispute the agreement must have been known and discussed in the family, and it is not likely that the plaintiff's husband would have concealed from the plaintiff the action which his brother contemplated.

The plaintiff's brother, Kumandan (twenty-second witness), had been summoned to Túni, when the plaintiff's husband entertained the intention of going to Benares in order that he might take care of his sister during her husband's absence. He was in the palace for some days—a fortnight, he says—before his brother-in-law fell sick, and it is impossible that he should not have been made aware of the position of affairs between defendant No. 1 and his brother.

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He admits that, during his brother-in-law's illness, he was present at a conversation between the plaintiff and her husband respecting the management of his estate: he asserts indeed that the plaintiff's husband had directed that an adoption should be made, and that the estate should be managed, and that the money due to defendant No. 1 under the deed of division should be paid to him whenever demanded.

Although we are unable to believe that the plaintiff's husband directed an adoption unconditionally and contemplated the possession of the estate by his widow at the very time he was insisting that the deed was binding on his brother, for that deed provided for the succession of the brother to the mitta and prohibited an adoption, it is in accordance with probability that the prospects of the widow should have been considered when it became apparent that her husband's illness was serious, and it is even more probable that the plaintiff's husband, whether he conceived himself seriously ill or not, should have discussed with his wife, and in the presence of her brother, his intention to insist on, or waive the agreement.

The plaintiff herself refers to the same conversation, but whether or not the plaintiff or her brother knew before her husband's death that defendant No. 1 intended to call in question the agreement of the 6th March 1880, the whole of the circumstances relating to the agreement and the intention to dispute it were known to Datla Sítárámá Rázu, the Dewan. He had, before the death of plaintiff's husband, been to Madras and taken legal advice on the question whether the agreement of the 6th March 1880 was binding upon the plaintiff's husband, and had arranged for securing professional assistance to restrain defendant No. 1 "if he raised difficulties and brought a suit, instead of accepting the settlement;" and he informed Kumandan of these facts when the negotiations were on foot which resulted in the agreement of the 27th August 1880. It appears from his own statement that this witness Sítárámá Rázu was regarded with distrust by the defendant No. 1 from the time of his brother's death, and that he acted as the partizan or at least as the adviser of the plaintiff.

There being no reasonable doubt that full knowledge of the facts was possessed by the plaintiff and her brother, and that they were aware of the legal advice which had been procured for her

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husband as to the efficacy of the agreement of March 1880, before the agreement of the 27th August 1880 was made, we proceed to consider the other grounds on which the plaintiff now seeks to repudiate that agreement.

It was conceded at the hearing of the appeal that the plea of coercion could hardly be maintained, and it is not, therefore, necessary for us to go into this part of the case at great length.

With reference, however, to the evidence adduced to show that the plaintiff's brother and others were prevented by violence and threats from taking the body of plaintiff's husband to the burning-ground, with a view to putting pressure on the plaintiff and so compel her to come to terms, we must observe that, according to the statements of all the witnesses who depose to the facts alleged in this respect, the Sub-Magistrate of Túni and the Inspector of Police were on the spot, and the witnesses were admittedly in communication with them, but neither of those officers is called as a witness to show that any complaints were made to them as to violence having been used or threatened. We note that Sítárámá Rázu, who in his examination-in-chief asserted that when he was taking steps for the performance of the funeral rites the defendant No. 1 came up and threatened he would cut and stab any one who interfered with the burning of the corpse, admitted in his cross-examination that he did not personally hear words to that effect used, and in his examination-in-chief that he did not personally see whether any guards were placed near the place where the plaintiff was. We do not then believe the evidence as to additional guards having been placed about the palace in order to prevent free communication between the plaintiff and the ladies who were with her, or with her male relatives and others who would be her natural friends and advisers on the occasion, though it is quite possible that guards were placed over the movable property after the death of the zamíndár, as is to be inferred from Sítárámá Rázu's evidence. Nor do we believe the evidence intended to show that she and her brother and others were in actual fear of bodily injury. The witness who speaks in the strongest terms of the violence and threats said to have been used by defendant No. 1 and his people, and of the pressure put upon the plaintiff and all connected with her, is her brother Kumandan, the twenty-second witness. Plaintiff herself does not go nearly so far,

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while the third witness, the Dewan Sítárámá Rázu, is also more guarded, and, while he states that he was informed by Kumandan, within a few days after the death of plaintiff's husband, that plaintiff had been induced to sign the agreement under threats that if this were not done the defendant No. 1 would bring a criminal charge against the plaintiff and himself of having poisoned the plaintiff's husband, he, according to his own account, did nothing and said nothing, except to advise that "they should keep quiet, and he would see what could be done when they got back to Chouduvada."

The evidence of these witnesses, as well as that of the tenth witness, Vatsavayya Venkata Náráyana (a son of Timma Jagapathi, son-in-law to plaintiff's brother Kumandan) and that of the nineteenth witness, Datla Chinna Venkata Krishnam Rázu, who is doubly connected with the family of plaintiff's husband by marriage, and also related to plaintiff—some of the most important witnesses both in respect of the statements made by them, as well as by reason of their position and relationship—is open to not a few of the unfavourable comments made upon it by the Subordinate Judge. We shall, however, have to consider this evidence further in connection with other circumstances.

It is not sufficient to find, as we do, that the consent given by the plaintiff was not caused by coercion as defined in the Indian Contract Act, nor by duress as known to the English Law; we have further to determine whether undue advantage was taken of the circumstances in which the plaintiff, a native lady of rank, was placed at the time when her consent was given to the agreement which she now seeks to set aside, or of the position in which her late husband's brother, defendant No. 1, then stood in relation to her; whether that agreement was concluded by the plaintiff without sufficient information as to her rights, or without proper advice; whether it was an unconscionable or "catching" bargain; and whether, for all or any of these reasons, it ought to be relieved against.

It was upon considerations of this nature that the learned Counsel for the plaintiff principally insisted. One of the cases cited, *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossain Khan* (1),

(1) L.R., 1 I.A., 206.

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contains a statement "of the principles which have always guided the Courts in dealing with sales or gifts made by ladies" in the position which the plaintiff occupies, and though this is not a case of a sale or gift, but of a family arrangement or settlement, to which favour is shown by the Courts, and in respect of which ignorance of rights on either side is not so minutely scrutinized, we have no hesitation in holding that, in the present case, it must be shown that the transaction was sufficiently understood by the plaintiff; that she herself was, or her competent advisers were, acquainted with her rights. Whether these requirements are fulfilled in the present case depends upon a consideration of all the facts. The Courts have, probably intentionally, refrained from defining in express terms what an unconscionable or catching bargain is; but surprise, improvidence, undue haste in carrying into execution the terms agreed upon, inadequacy of consideration, are all matters to be taken into account in determining whether an agreement of this sort ought to be set aside or upheld. It is no doubt true that this agreement was concluded very shortly after the death of the plaintiff's husband, and it may well be assumed that the plaintiff was in great grief. Negotiations were commenced within a very few days at latest after her husband had breathed his last. The arrival of Kakerlapúdi Sítárámá, the husband of the plaintiff's elder sister, Sundarayya, who is frequently referred to as the influential brother-in-law, was not awaited.

On the other hand, we cannot say that the plaintiff had not with her competent advisers. The third witness, Datla Sítárámá, who, as we have observed, as Dewan under her husband and his father, must have been, and is shown by his own account to have been, very intimately acquainted with all the affairs of the family, was there, and his own evidence shows that he was consulted frequently by plaintiff's brother, Kumandan; he was present on two occasions when the inventory of the jewels was being made and gave information respecting them. Plaintiff's brother, Kumandan, admits that the plaintiff had a good opinion of Sítárámá, who in this case has been interesting himself strongly on the plaintiff's behalf, and is admittedly adverse to defendant No. 1. Kumandan, the twenty-second witness, is certainly a man of affairs, and interested in his sister's welfare; and the tenth witness, Venkata

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Náráyana, who is now evidently hostile to defendant No. 1, was, in our opinion, beyond doubt consulted with reference to the negotiations throughout, and what he thought of the settlement proposed appears very clearly from the letter, exhibit XXX (a) written by him, as he admits, on the 24th August 1880, only two days after the death of the plaintiff's husband. In this after informing the correspondent to whom he wrote of the terms proposed, he says "it will be the best thing that can happen if matters can be settled in this way."

The nineteenth witness for plaintiff, Datla Chinna Venkatakrishnan, a relative of the plaintiff, as well as of the plaintiff's husband, was also there; and he was, as he admits, consulted by Kumandan, though, he says, he declined to interfere; he was present when the jewels were counted and valued, and says that Kumandan may have come twice or thrice while this was going on. This witness' evidence is important as showing that he had a conversation with the defendant No. 3, as to the probability of success or failure of an attempt to contest the division-deed between plaintiff's husband and defendant No. 1. He says that, for the reasons given to him by the defendant No. 3, he came to think that the deed of division, which before then he had thought to be a valid document, might be shown to be not so, by reason of the money agreed therein to be paid not having been paid; whatever his views on this subject, his evidence is of some weight as showing that the legal validity of the partition-deed was in fact discussed. His reasons for refusing to interfere we cannot believe, as it is clear he was taking part with Kumandan.

The plaintiff and her advisers had not, it is true, the advantage of professional advice, and our attention has been called to the case of *Prem Narain Singh* v. *Parasram Singh* (1), which, among other reasons for setting aside an "ikrarnamah," this circumstance was given weight. But this was only one of several considerations which influenced their Lordships in deciding that the deed executed should not be upheld, and in other respects that case differs very materially from this. The deed was found to have been executed without any consideration whatever, in a state of things "likely to overawe" the parties, "and materially to affect the free exercise of their will."

(1) L.R., 4 I.A., 101.

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It may and probably does frequently happen in this country that it would be difficult to obtain in time such professional advice as would be worth having, for the settlement of family disputes: relatives and members of the family are capable advisers in such cases, and we are not prepared to hold, and think it would be a matter for regret if it were held, that on this account alone a family settlement of doubtful claims should be set aside.

As to undue haste, there is evidence given by defendants 2 and 3 examined as plaintiff's fourth and fifth witnesses, as well as by witnesses on the side of defendant No. 1 that proposals for a settlement emanated from plaintiff herself, or her advisers, and whether this evidence be strictly true or not, we may observe that it is not unusual in this country to take advantage of the presence of relatives and friends on the occasion of the funeral, to have matters settled with regard to the claim of a widow on the estate of her husband. Moreover, though negotiations commenced, as we find, on the second or third day after the plaintiff's husband died and a draft of the agreement was written very soon after this, the fair copy of the agreement was not signed until the 27th August, that is the fifth day after the death, and the instrument itself was not registered until the 7th September; and in the meantime the additional agreement had been made as to a money maintenance to be paid to the plaintiff, and alterations introduced into the principal agreement (exhibit XXV) as to defendant No. 1 alone being liable for his mother's maintenance and as to additional house accommodation for plaintiff.

The plaintiff's evidence as to the instruments not having been shown to her before the 7th September, we cannot accept as true. It is opposed to the oral and documentary evidence, and in contradiction to the allegations made in her petition to the Collector, exhibit LX. It is, indeed, almost incredible that the plaintiff and her advisers should have deliberately and for so long acted their parts, taking all the property given, and executing all the documents, and should not even before the Registrar have thrown out a hint that all that was done was not voluntarily done, or have even attempted to communicate with other friends or relatives, or with any official; and though we would not make too much of this but it is to be noted that, while the plaintiff left Túni on the 15th September, her petition in which she first speaks of her having

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Buchi Rámáyya v. Jagapathi.

been compelled against her will to execute the agreement of the 27th August, is only dated the 5th October and did not reach the Collector till the 17th. No doubt there is some evidence that she was unwell, but even if she was this is hardly a satisfactory explanation of the delay, when her brother and other influential relations were present to act for her.

The fact that the deed of agreement, exhibit XXV, and subsidiary documents were not attested by plaintiff's brother, Kumandan, or other relatives, has been commented on as a circumstance tending to throw suspicion on the transaction.

If those concerned had determined to make it appear, as far as possible, that the arrangement which they professed to accept was agreed to, it does not appear why they should have drawn the line at attesting the documents which the plaintiff feigned (as they say) to execute, and the evidence given by Sítárámá Rázu that Kumandan insisted on concluding the arrangement, notwithstanding his advice to the contrary, is inconsistent with any unwillingness on Kumandan's part to conclude it. The reasons given by the nineteenth witness, Datla Chinna Venkatakrishnan, for refusal to attest, namely that he was not willing to act against the wishes of his sister-in-law and that he refused because Kumandan refused, and Kumandan's explanation of his refusal do not appear to us at all satisfactory or worthy of credit. We think it not improbable that these and other members of the family, who were present and who could apparently have had no other reasons for refusing to attest, may have declined to affix their signatures as witnesses, as the Subordinate Judge finds they did, because they had not before been in the habit of doing so, because to do so is considered by persons of their position unbecoming their dignity and for fear that they might be called to give evidence in Courts or elsewhere, as to the execution of the documents attested by them.

We now pass on to consideration of the question whether from the amount accepted by plaintiff, under the agreement (exhibit XXV) as compared with what the plaintiff would have been entitled to as the widow of the brother of defendant No. 1, it is to be inferred that the bargain was manifestly unfair to the plaintiff.

The provision made for her was a very handsome provision in itself. It was almost the same as that defendant No. 1 had been content to accept as the equivalent of his share in the movable

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property and the consideration for waiving his asserted right to partition of the Kottam estate. The widow has at her absolute disposal 1,75,000 rupees.

In what position would she have stood if the settlement had not been made?

Defendant No. 1 was, as we have seen, prepared to contest the division of movables effected between him and the plaintiff's brother, on the ground that, as alleged by him, some 3,00,000 rupees had been concealed under the pretence that cash to this amount was the subject of gifts to the plaintiff's husband, to her, and to her son. Whether a claim to have that division set aside on this ground would have been successful, it is not necessary to decide; nor again whether, the division being maintained, a claim to a further share in the amount alleged to have been concealed might have been successful. But we are bound to say that the evidence adduced to prove the alleged gift of three lakhs to the plaintiff's son is, for reasons sufficiently explained by the Subordinate Judge, to say the least of it, open to grave suspicion.

The plaintiff's allegation was to the effect that a lakh of rupees was given by her father-in-law to her husband in 1861 or thereabouts, and a further gift of two lakhs to her husband, herself and her son, jointly, in 1870.

* * * *

The conclusion at which we arrive on this part of the case is that it is not satisfactorily proved that there was a gift of three lakhs of rupees to the plaintiff's husband and plaintiff.

Another question for consideration is whether the share in movables retained by her husband, if taken by the widow, would have been at her absolute disposal. If the answer to this were in the affirmative, the present bargain would not be, on the face of it, so clearly to her advantage as giving her absolute disposal over a very considerable amount of movable property, which she would not otherwise have had.

The question whether a widow has an absolute right to dispose of the *corpus* of movable estate, inherited from her husband, has been much discussed and the early decisions have been at first doubted and now over-ruled.

The principal cases on this point decided by the late Sadr Court of Madras were referred to by the Privy Council in *Bhugwan*

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BUCHI RÁMÁYYA v. JAGAPATHI.

Deen Doobey v. *Myna Baee* (1), and it was remarked that in only one of these, *Gopaula Putter* v. *Narraina Putter*, (2) were the authorities relied on by the pundits, on whose "Bywastas" the Courts acted, quoted, those authorities being the Madhaviya and Sarasváti Vilása commentaries. On looking into these, we find passages in the latter work which apparently go rather to bear out the contrary view, while we have been unable to find any that support the *dicta* of the pundits.

We refer to ss. 516, 521, and 532 in the Sarasváti Vilása, Foulkes' translation (Trübner & Co., 1881).

(516) When the husband is dead, she who upholds his family shall receive her husband's share; her proprietorship is for her life, in gift, mortgage and sale.

(521) The sonless wife who guards her husband's bed and is steadfast in her continence and docile, shall have possession until her death, after her the heirs shall have it.

(532) Regarding the two texts, *i.e.*, the first given above (516) and the second given in 521, but at greater length as follows: "when her husband is dead, she who upholds the family shall receive her husband's share in the immovable as well as the movable, the grosser metals, the grains, the fluids, and the clothes; but her proprietorship is for her lifetime, in gift, mortgage, and sale"—they are to be expounded as applying to the wife who has no daughter, on the strength of these two passages "after her the heirs shall have it," and, "but her proprietorship is for her lifetime."

We can see here no distinction drawn between movables and immovables.

In the Madhaviya, s. 35, page 25 (Dr. Burnell, Higginbotham, Madras, 1868), on the text of Vriddha Manu, "the wife (*i. e.*, widow) who has no son, who preserves inviolate the bed of her husband, and is steadfast in her duty, should offer the pinda for him, and take the whole share," the commentator remarks "the whole share" consisting of movable and immovable property, and he quotes the text of Prajápati: "Taking his property, movable and immovable, the silver and base metal, grain, liquids and clothes."

And in s. 44, in explaining the Vedic text "women are powerless and cannot succeed to the heritage," the same commentator

(1) 11 M.I.A., 508. (2) M.S.D., 1850, p. 77.

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quotes the text of Brahaspati, which prohibits a wife from taking immovable property, with the following comment, viz., "Let the wife, whose husband is dead and who is divided, leave the immovable property and take some pledge, &c.," and observes that it is only prohibitory of the widow selling or making away with immovable property without the consent of the other heirs; else it would be inconsistent with the text, "Let the widow take the immovable and movable property, the gold, base metal, grain, liquids and clothes; let her cause the sraddhas to be offered in each month, the sixth month, &c.; let her honor with offerings to the gods and pitrs, paternal uncles, gurus, daughter's sons, the children of her husband's sisters, his maternal uncles, also old persons and guests."

The first passage merely concedes to the widow equal rights in movable and immovable property; the second, while it expressly denies the widow power to aliene immovable property without the consent of the other heirs, does not expressly concede to her an unqualified power to deal with other property, but concludes with a text declaring for what purposes the widow is allowed to inherit.

Having regard to the absence of express authority in Madhaviya's commentary to the agreement with other authoritative commentaries, the texts of the Sarasváti Vilása, as well as to the observations of their Lordships of the Privy Council in the case above quoted, it has recently been held by this Court in *Narasimha* v. *Venkatadri*, (1) that the restriction which is placed on the widow's power of alienation over property inherited from her husband extends to movable as well as immovable property.

Convenience suggests that a widow should have power to make such dispositions of movables as are consistent with their nature and requisite for their enjoyment, *e.g.*, grain must be sold or consumed, the increase of cattle must be disposed of when not required for the purposes of the estate; but it is one thing to hold that a widow has a disposing power for the purposes of enjoying movable property, and quite another to hold that she is at liberty to waste it, or aliene it as she pleases, so as to defeat the interests of the reversionary heirs. It cannot be said that, at the time when the agreement of the 27th August 1880 was made, the enjoyment

(1) I.L.R., 8 Mad., 290.

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by a widow of an unqualified power to dispose of the *corpus* of movable property inherited from her husband did not admit of question.

The conclusions then at which we arrive are that the deed of the 27th August 1880 was executed by the plaintiff deliberately, and on the advice of her relations, she and they being sufficiently acquainted with all material facts; that it was a settlement of the claim of defendant No. 1 to set aside the agreement of the 6th March 1880, and of the claim of the widow to property alleged to have been separate property acquired by her and her husband by gift; that although she had no professional assistance with respect to the arrangement which she accepted, it was known to her advisers what professional advice had been given respecting the obligatory force of the agreement of the 6th March 1880 on defendant No. 1; that the plaintiff was fully aware of the claims she was renouncing; and that her advisers regarded the arrangement as a just and equitable one; and that it is not proved to have been otherwise.

In this view, we consider that the plaintiff is not at liberty to repudiate the agreement of the 27th March 1880, and inasmuch as that agreement operated as a satisfaction of the other claims she asserts in this case, her suit was properly dismissed.

No cause of action appears as against defendants Nos. 2 and 3. As regards the defendant No. 1 we should have hesitated to confirm the order of the Lower Court in respect of his costs in that Court, had it not been that, instead of confining herself to questioning the legal validity of the agreement of March 1880, the plaintiff allowed gross mis-statements of facts and exaggerations to be introduced into the plaint filed on her behalf, in support of which evidence has been given at great length, which we are altogether unable to believe.

The appeal then is dismissed with costs in favor of all the defendants.

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23 Mad. 289.
28 Cal. 197.

34 Mad 68
32 C.L.J. 333
48 Cal. 643
50. Mad 340

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

KUPPA (DEFENDANT), APPELLANT,

and

SINGARAVÉLU (PLAINTIFF), RESPONDENT.*

1885.
January 5.
February 24.

Hindú Law—Sudra—Illegitimate son—Issue of adulterous intercourse—Maintenance.

A Sudra having kept the wife of another man in his house for many years as a concubine, had a son by her, whom he recognized as his own.

In a suit brought by the son, who was of age, to recover maintenance from his putative father:

Held, that he was entitled to recover.

THIS was a suit, *in formâ pauperis*, brought by Singaravélu in 1883 against Kuppa Pillai to recover maintenance at the rate of Rs. 600 a year, together with three years' arrears at the same rate and interest thereon, and Rs. 2,000 for marriage expenses to be incurred. Plaintiff alleged that his mother was kept by defendant who had three children, including himself, by her; that he came of age in 1881, from which time he had not been maintained by defendant, but had maintained himself by contracting debts. The family property, he alleged, yielded Rs. 8,000 a year.

Defendant pleaded, *inter alia*, that the mother of plaintiff was a married woman who had committed adultery with several persons besides himself, and that plaintiff's paternity was, therefore, doubtful, and that, as plaintiff's mother was of a low caste (Kullar), plaintiff, who was of age, was bound to maintain himself by labour.

The Subordinate Judge at Negapatam, R. Vasudeva Ráu, found that plaintiff's mother had been kept by defendant in his house for 25 years, that there was no doubt as to plaintiff's paternity, and that defendant had treated plaintiff as his son, and held that under Hindú Law plaintiff was entitled to maintenance. *Muttu-*

* Appeal 71 of 1884.

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KUPPA v. SINGARAVÉLU.

samy Jagavira Yettapa Naikar v. *Venkatasubha Yettia*,(1) confirmed on appeal by the Privy Council,(2) *Vencatachella Chetty* v. *Parvatham*,(3) *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn*.(4)

The decision in *Nilmoney Singh Deo* v. *Baneshur*(5) relied on by the defendant was held not to be applicable to the Madras Presidency.

The plaintiff obtained a decree for maintenance at Rs. 140 a year and arrears of maintenance, and for Rs. 200 for marriage expenses.

The defendant appealed to the High Court.

Gurumúrti Ayyar for appellant contended that plaintiff being of age was not entitled to be maintained by the defendant.

*Gopaláchárya*r, *contrá*, referred to *Viraramuthi Udayan* v. *Singarvélu*,(6) *Ráhi* v. *Govinda Valad Tejér*,(7) *Hargobind Kuari* v. *Dharam Singh*.(8)

The Court (Turner, C.J., and Muttusámi Ayyar, J.) delivered the following

JUDGMENT:—This appeal arises in a suit which the respondent brought to recover maintenance from the appellant, his putative father. The appellant resisted the claim, 1st, on the ground that the respondent was not his son; 2ndly, on the ground that his connection with the respondent's mother was adulterous; and 3rdly, on the ground that the claim is not valid under Hindú Law. As to the first contention, we concur in the opinion of the Subordinate Judge that respondent is appellant's son, and the evidence, oral and documentary, bearing on the question is almost conclusive. The main contention on appeal was that the respondent's mother was a married woman living in adultery when he was born.

On this point, the Subordinate Judge has recorded no distinct finding, probably under the impression that the contention is immaterial in regard to a claim for maintenance as contradistinguished from a claim to inheritance. That an illegitimate son is not entitled to inherit to a Sudra under the Mitákshará Law, if he is the offspring of incestuous or adulterous intercourse,

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(1) 2 M.H.C.R., 293.
(2) 12 M.I.A., 203.
(3) 8 M.H.C.R., 134.
(4) 7 M.I.A., 18.
(5) I.L.R., 4, Cal., 91.
(6) I.L.R., 1, Mad., 306.
(7) I.L.R., 1, Bom., 97.
(8) I.L.R., 6, All., 329.

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has already been recognized by this Court—*Venkatachella Chetty* v. *Parvatham.*(1) In *Muttusamy Jagavira Yettappa Naicker* v. *Venkataswara Yettaya,*(2) the Judicial Committee have, however, held, confirming a decision of this Court, that the natural son of a Hindú father, recognized by him as such, is entitled to maintenance, although he may not have been born in the house of his father or of a concubine possessing such a status as is necessary to entitle her son to inherit to his father. The appeal must therefore fail, and we dismiss it with costs.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Hutchins, and Mr. Justice Brandt. 37 Mad 136

MUNICIPAL COMMISSIONERS OF MANNARGUDI

against

NALLAPA.*

1885. January 23. February 24.

Towns' Improvement Act, 1871, *ss.* 64, 72—*Tax on animals—License, Extent and limit of.*

N having taken out a license under the provisions of the Towns' Improvement Act, 1871, for a bullock, the bullock died and N bought another bullock, but did not take out a second license. N was convicted for keeping this bullock without a license:

Held, (by Turner, C. J., and Hutchins, J. Brandt, J. dissenting) that the conviction was right.

THIS was a case referred for the orders of the High Court by J. B. Pennington, District Magistrate of Tanjore, under s. 438 of the Code of Criminal Procedure. The case was stated as follows:—

" The defendant in the case has been convicted by the Bench under s. 67 of Act III of 1871, of omitting to get a license for a bullock, and sentenced to pay a fine of four annas, in addition to the fee for the license, annas eight. He had apparently taken a license for a bullock which died in the course of the half-year, whereupon he bought a fresh bullock (the bullock in question) to replace the one that died. It appears to me unnecessary to get a

(1) 8 M.H.C.R., 134. (2) 12 M.I.A., 203.

* Criminal Revision Case 787 of 1884.

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fresh license for the new bullock, as I think the license obtained for the dead bullock will hold good for the new bullock for the same half-year. But s. 65 of the Municipal Act is not quite clear, and I submit the case in order to obtain an authoritative ruling from the High Court. The fee and fine in the present case have been collected."

Counsel were not instructed.

The Court (Turner, C.J., Hutchins and Brandt, JJ.) delivered the following judgments:—

TURNER, C.J.—The language of Act III of 1871, ss. 63—72 is, so far as it is material, as follows:—

"S. 63. If it shall be determined by the Commissioners ..... to levy, for the purposes of this Act, taxes on carriages, horses, and other animals, such taxes shall be levied as provided in ss. 64 to 72 of this Act.

"S. 64. A tax at a rate not exceeding the rates specified in sch. C ..... shall be imposed upon every carriage, horse, ass, dog, bull, bullock ..... kept within the town and shall be payable in advance. Provided that this section shall not apply to ..... carriages or animals, the property of the Municipal Corporation, or vehicles kept for sale and not used for any other purpose, if the property of, and kept by, *bonâ fide* dealers.

"S. 65. The owner or person having the charge of every carriage, horse, ass, dog, bull, bullock ..... shall ..... send ..... a statement in writing signed by him containing a description of the vehicles and animals liable to the tax, for which he desires to take out a license.

"The owner shall, at the same time, pay to the Commissioners the half-yearly taxes payable by him ..... according to the rates given in sch. C.

"Any person becoming possessed, between the first day of the official year and the first day of the next succeeding half-year, or between such last-mentioned day and the first day of the next official year, of a carriage or animal so kept, shall, within thirty days of becoming so possessed, send ..... a similar statement, together with the full amount payable for the then current half-year..... Provided always that no person shall be liable to be taxed under this section for any carriage or animal which shall have been in his possession for any less period in any half-year.

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"Section 66. On receiving the amount of the taxes as aforesaid, the Commissioners shall give to the person paying the same a license for each of the vehicles and animals for the period in respect of which the money is received. The owner of every carriage and animal aforesaid, who shall have received a license for the same, shall, at all reasonable times, during the said period, be bound . . . . . to produce such license when called upon to do so by any person duly authorized to demand its production.

"Section 67. If the owner or any person having the charge of any carriage or animal so kept as aforesaid shall not have taken out a license under the last preceding section, he shall, on conviction before a Magistrate, be fined the full amount payable by him in respect of such carriage or animal . . . . and the Commissioners shall thereupon give him a license for the vehicles and animals in respect of which he has been fined as aforesaid."

Then follow sections relating to carriages and animals kept for hire. Section 68 requires that each such carriage shall bear a registration number.

Section 69 empowers the Commissioners to compound with livery stable-keepers, &c., for a certain sum to be paid for all the carriages or animals so kept in lieu of the taxes specified.

Section 70 is as follows:—"Whenever the owner of a carriage or animal, as aforesaid, kept for the time being in premises situated within the town, shall not reside in the town, the tax due for such carriage or animal shall be recoverable from the person in whose premises it is for the time being kept."

Section 71 requires the Commissioners to keep a register "of the persons, who, during the then current six months, shall have received a license under s. 66 of this Act, and of the vehicles and animals in respect of which they may have paid."

Section 72 empowers the Commissioners, &c., to enter and inspect any place wherein they may have reason to believe there is any vehicle or animal liable to taxation under s. 64 of the Act for which a license has not been duly taken out; and it also empowers the Commissioners to "summon any person whom they may have reason to believe to be liable to the payment of any tax under the last mentioned section" . . . . "and to examine such person as to the number and description of the carriages, horses

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or other animals, in respect of which such person is liable to be taxed."

It will be seen that the Commissioners are authorized by s. 63 to levy taxes not on any person in respect of the number and description of carriages and animals kept by him, but on carriages, horses and animals; and although I should not insist on the terms of this section, because there may be a want of precision in its language, and a tax assessed on a person in respect of the carriages or animals kept by him might be described as a tax on carriages or animals, section 64, which follows, does not admit of such an explanation. That section distinctly states that a tax shall be imposed on every carriage, horse, ass, dog, bull, bullock, &c., kept within the town, and the proviso does not exclude the corporation, but vehicles and animals, the property of the corporation; nor does it exclude *bonâ fide* dealers in vehicles, but vehicles kept by them for sale and for no other purpose and, moreover, which are their own property. So that, if a vehicle, belonging to a person who is not resident in the town is sent for sale to a dealer and is not kept for any other purpose, it is liable to the tax. Again s. 70 sanctions the collection of the tax on carriages or animals of non-resident owners and whether or not they are used.

The 65th section requires the owner or person, having charge of a carriage or animal kept within the town, to send not a mere list but a description of the vehicles and animals *liable to the tax*, and although, in practice, the only description given is of the class so as to ascertain the amount of tax prescribed in the schedule, I think it clear the Commissioners might insist on a description which would identify the vehicle or animal and that this was intended.

Again, on receiving the amount of the tax, the Commissioners are required to give a license for *each* vehicle and animal. If it had been the intention that the tax should be assessed on a person in respect of the number of vehicles or animals kept by him, it would have been enacted that a license should be given to the person assessed for so many vehicles or so many animals of the class for which he had been assessed and had paid the tax.

In section 66 we find that "the owner of every carriage and animal aforesaid who shall have received a license for the same" is required to produce such license. If the tax had been assessed on

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the person, he would receive one license in respect of so many carriages or so many animals of a certain description. Again, carriages let out for hire are to bear a registration number, s. 68; and by s. 72 the inspection is allowed of any premises wherein the Commissioners have reason to believe there is "any vehicle or animal liable to taxation."

The second clause of this section, it is true, authorizes the Commissioners to examine any person as to the *number* of any carriages kept by him, but this may have had in view the provisions of s. 69 enabling livery stable-keepers to compound.

The only passage which can be referred to, to support a contrary construction, is the proviso to s. 65: "no person shall be liable to be taxed under this section" for any carriage or animal which shall have been in his possession for any less period not exceeding thirty days in any half-year; but the law must declare the owner liable for the tax imposed on the carriage or animal. If then a person loses or parts with a carriage or animal in respect of which he has taken out a license and acquires another for which a license has not been taken out, he is liable to pay the tax for such other. It might indeed be contended that, under the third paragraph of s. 65, a person acquiring within the half-year a carriage or animal for which a license had been taken out, is required to take out a second license, but I do not think that this is the true construction of the paragraph. The section is obviously dealing with carriages and animals for which no license has been taken out, and the license which the Commissioners are required by s. 66 to give on payment of the tax is expressly declared to be "for the period in respect of which the money is received," that is to say, the whole period.

In the 77th section of Madras Act IV of 1884 there is a distinct provision that no person by reason of transfer of ownership shall be liable in respect of any vehicle or animal for which a license relating to the half-year in which ownership was transferred has already been given—and indeed the Act adds "in any municipality:" so that under the amended Act if the tax has been paid on any carriage or vehicle and a license obtained in any municipality for a particular half-year, the payment of the tax cannot be enforced by any other municipality for that half-year, although there may have been a change of ownership.

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The amended Act may fairly be referred to as indicating the intention of the Legislature as to the nature of the tax.

It is thus shown to be a tax on any vehicle or animal described in the Act kept in any municipality above a certain period.

It is only in cases in which the owner loses a vehicle by destruction or an animal by death that this construction will work any hardship.

On the other hand the construction prevents the payment of tax twice or more frequently in the same half-year in respect of the same animal or vehicle. Practically it is probable that the latter construction will not yield so much to the municipality as the former.

In the case before the Court it was not pleaded that the tax had already been paid for the half-year on the animal purchased by the accused; if it had been paid by the former owner, this should have been pleaded and proved. The conviction must be affirmed.

BRANDT, J.—No doubt s. 64 requires payment of a tax at the rate prescribed on *every* carriage, horse, &c., kept within the town: but if a carriage is destroyed by fire or an animal dies for which a license for the half-year has been taken out, such tax may, I think, be taken to cover a carriage bought from a maker or a horse brought in from outside municipal limits to replace the lost vehicle or animal.

Again s. 65 requires the owner to send in a statement containing a *description* of the vehicles and animals liable to the tax for which he requires a license, but looking at the practice, viz., the sending out of a printed form showing only so many vehicles on four wheels, or two wheels, and so many horses only, and so many ponies, without any requirement of description by colour, marks, &c., and looking also at the not very precise wording of the Act in several instances, and at the meaning which may not unfairly be placed on the word *description*, 'an account,' 'recital,' 'writing down,' it seems to me that the word does not necessarily imply more than such a description as will truly show whether a vehicle is a four-wheeled vehicle on springs, or a horse over a certain height and so on. The tax is, to a great extent at all events, levied with reference to, and for the use and wear of, municipal roads, and it does not appear to me what difference it can make to the municipality whether they are used by one

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animal or another, or by one carriage or another, provided that a tax is paid on 'every' carriage or animal using the roads, according to its size and 'description,' or class as defined for the purposes of the Act.

It may no doubt be that it is so much the better for the municipality if an owner loses a horse during the half-year and has to take out a fresh license for a horse bought to replace the other, but I cannot suppose that the Act was framed with this object in view.

Take the case of an exchange by two persons in the municipality of two carriages for each of which a license has been taken out. If the owner of carriage A chooses to transfer with it his license for that carriage and the owner of carriage B to transfer with his carriage his license for that carriage, no doubt the conclusion arrived at by the learned Chief Justice would cover the case, but what difference could it make if each owner retained his original license? It is not required that each license shall be pasted into, or affixed to, the carriage for which it is originally given. And so in the case of horse purchased to replace one which has died.

It appears to me only reasonable to suppose that it was not intended that a municipality should make profit out of a tax-payer's misfortune, and that it is not absolutely necessary to place on the wording of the Act a construction leading to the results which the judgment of the learned Chief Justice establishes.

Municipal bodies have ample means at their disposal to ensure that no fraud is committed.

[In consequence of the difference of opinion between their Lordships, the case was referred to Hutchins, J., who delivered the following judgment:—]

HUTCHINS, J.—This case first came before me in the Admission Court. I then stated that I was disposed to think, *primâ facie*, that a license runs with the animal, but that the point was one which ought to go before a Bench of two Judges.

The question seems to turn on whether the license is for a particular vehicle or animal, or for any vehicle or animal which the licensee may possess provided the whole number for which he takes out licenses is not exceeded.

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MUNICIPAL COMMISSIONERS OF MANNARGUDI v. NALLAPA.

Section 64 of the Act contemplates a tax "upon every carriage, horse, ass, dog, bullock, &c.," kept within the town—*i.e.*, *primâ facie*, a tax on the particular vehicle or animal.

Section 65 requires the owner or person having the charge of every carriage, horse, ass, &c., to send to the Commissioners a description of the vehicles and animals liable to the tax, and to pay the tax. Then follows a clause regarding the construction of which I was overruled in *Snaith* v. *McQuhae*, (1) but which I still think must be interpreted by the analogy of s. 75. I do not understand the learned Judges who decided that case to have overruled me in that respect or to have held that a transferee of a licensed vehicle or animal is bound to take out a fresh license. I prefer not laying any stress on the word 'description' for I do not see how it can be extended beyond such description as may be necessary with reference to schedule C to show the class within which the vehicle or animal falls and the rate of tax to which it is liable.

Under section 66 the Commissioners are to give, not a single license for the specified number of each class of vehicles and animals, but "a license for each of the vehicles and animals," and as such license is to be for the whole half-year, it would probably cover the vehicle or animal even in the hands of a transferee. I do not understand that Mr. Justice Brandt doubts the power of the licensed owner to transfer the vehicle or animal with its license, if he so pleases.

So far no difference is made between hackney-carriages and other vehicles or animals, but section 68 makes a provision with regard to vehicles kept for hire which seems to show that the license for such vehicle is for that vehicle only and no other—all such carriages shall bear a registration number, and the number assigned to it has to be affixed to the carriage.

The effect of section 69 is to enable livery stable-keepers and other persons keeping many carriages or animals for hire to compound for the tax, unlike other persons who, as before provided, have to take out a license for each.

Upon the face of the Act then what is contemplated in the case of ordinary owners is a license for, and appropriated to, each

(1) 7 M.H.C.R., 332.

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vehicle or animal. To see whether this is likely to have been the intention of the Legislature we may fairly refer to the new Act designed to replace Act III of 1871. Section 77 of that Act enunciates the very same principles—(2) the amount payable for each half-year shall be payable by any person in whose possession .... any vehicle or animal may be found, so soon as *it* has been for 30 days in such half-year kept.. within the Municipality; (3) no person by reason of transfer of ownership shall be liable in respect of any vehicle or animal for which a license .... has already been given. Sections 80, 81 require every person to give "such information respecting the vehicles and animals kept by him as the Chairman considers necessary for the assessment of the tax," and these words certainly go some way to support the inference which the learned Chief Justice has drawn from the word description, but on which I have thought it better not to lay stress.

It must, I suppose, be conceded that the Legislature either had the particular vehicle or animal in contemplation throughout, or else it all along had in view a vehicle of such and such a general description, a horse of so many hands, and so forth. The question may then be tested by taking the exact converse of the present case. Suppose the accused, instead of being prosecuted for having the new bullock unlicensed, had kept the old bullock 30 days, had then replaced it by this one, and had then been prosecuted for not taking out a license at all—it would have been a complete answer to the charge that he had not kept any particular bullock in the town for more than 30 days. For the proviso to section 65 runs thus—"No person shall be liable.. for any carriage or animal which shall have been in his possession for 30 days only." It seems to me that any carriage or animal must there mean any particular carriage or animal, and if so, surely it follows that the tax imposed upon every carriage or animal is imposed on that particular carriage or animal. I therefore remain of the opinion, which I formed *primâ facie* in the first instance, that the Act requires every particular vehicle or animal, used or kept for more than 30 days in the half-year, to be paid for; and that a person becoming possessed of an unlicensed horse within the half-year is not at liberty to transfer to it a license taken out for another which has died or been sold. In the case of the exchange referred

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MUNICIPAL COMMISSIONERS OF MANNARGUDI v. NALLAPA.

to by Mr. Justice Brandt, it will of course make no difference whether the particular bits of paper are exchanged or not, for, as at present issued, they are in every respect identical, but I do not see what there is to prevent the Commissioners from inserting in the license any description of the vehicles or animals that they deem necessary for the security of their income.

I am not therefore prepared to hold that the conviction in this case was illegal. The accused person has never alleged that the tax on the bullock had already been paid by its former owner. That was a point which he ought to have pleaded and proved, if he relied on it, and it is probable that the bullock was bought outside Municipal limits. Anyhow, the tax and the fine together amounting to but 12 annas, I do not see sufficient ground for ordering an inquiry in the absence of a complaint.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

1885. January 23. February 24.

10 Bom. 131. 12 Cal. 522. 9 All. 52. 15 Cal. 608. 14 Mad. 334. 32 Mad 214. 32 Mad 220.

QUEEN EMPRESS

against

AMIR KHAN AND ANOTHER.*

Criminal Procedure Code, s. 437—Further inquiry—Re-trial—District Magistrate, Powers of.

Where an accused person has been discharged by a Magistrate, further inquiry cannot be directed under s. 437 of the Code of Criminal Procedure on the ground that the Magistrate has not rightly appreciated the credit due to the witnesses.

Further inquiry should only be directed when other witnesses might have been examined, or when the witnesses have not been properly examined; and inasmuch as s. 437 does not direct that the evidence already taken should be taken again, the further inquiry should ordinarily be made by the Magistrate who made the original inquiry.

Where a District Magistrate being of opinion that a Subordinate Magistrate had, without just cause, refused credit to the witnesses in a certain case and had

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* Criminal Revision Case 737 of 1884.

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improperly discharged an accused person, directed a further inquiry by another Magistrate, and the accused was on the same evidence re-tried and convicted:

Held, that the conviction must be quashed.

THIS was a petition to the High Court under ss. 435 and 439 of the Code of Criminal Procedure, praying that the proceedings of J. W. Reid, Sessions Judge of Coimbatore, dated 11th November 1884, confirming on appeal the sentence of the Temporary Deputy Magistrate of Coimbatore in calendar case No. 23 of 1884, might be revised.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the Court (Turner, C.J., and Brandt, J.)

Counsel were not instructed.

TURNER, C.J.—According to the evidence of the complainant, the petitioners came to his shop, and the petitioner, Amir Khan, handed to him a currency note for Rs. 10 and asked him to change it. The complainant expressed his willingness to do so subject to a deduction of 4 annas for commission, to which Amir Khan agreed. By Amir Khan's direction, the complainant handed 9 rupees to the petitioner Yakub Khan, who at once went away. The complainant asked Amir Khan to sign the note, which he did. The complainant then tendered him the balance of the change, 12 annas. Amir Khan then asserted he had not received the 9 rupees and protested he had no knowledge of Yakub Khan, and, throwing down the 12 annas, he snatched the note from the hand of the complainant and walked away with it. The complainant, taking with him a cartman and some other persons he met in the street, went in search of the petitioners and found them together and gave them in charge of a constable, informing him of what had occurred. The petitioners were taken to the house of the Inspector of Police, where Amir Khan produced two currency notes and Rs. 7, and the complainant identified one of the notes as it bore on its back the signature written in his presence.

Kasturi, the complainant's gumasta, who came into the shop as Yakub Khan was leaving it, identified him and corroborated the complainant's evidence as to what occurred subsequently up to the time when Amir Khan left the shop.

Papanna, the cartman, deposed that the first witness came to him and told him that a Mussulman had come to him and asked

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to change a note and had taken away forcibly the note and the change, and that he accompanied him to search for the man. He corroborated the complainant's evidence as to the discovery of the petitioners and their arrest.

The petitioners were charged with cheating or theft.

The petitioner, Amir Khan, stated that he went to the shop of the complainant to change a note, and that, when the complainant handed him Rs. 9-12-0 only, he demurred to the amount deducted on the ground that it was excessive; that after a wrangle he returned the money and went away; and that afterwards the complainant came with a constable and arrested him and Yakub Khan; and he attributed the arrest to malice on the part of the police. Yakub Khan admitted he had gone to the complainant's shop to get some cotton seed, as he said, but failed to get any. He denied that he had seen Amir Khan there, and asserted that he had returned to a chatram and laid down there, to which place a number of people brought Amir Khan, and he accompanied them to "see the fun," when he was arrested.

The Second-class Magistrate who tried the petitioners took the evidence of the complainant, his gumasta, and the cartman, and discharged the accused.

On perusing the records the District Magistrate recorded the following order:—"In this case two persons, Amir Khan and Yakub Khan, were accused of stealing a currency note of Rs. 10 from the complainant Sellan Chetti. The Sub-Magistrate dismissed the case because he considered the complainant's statement was unsupported, and because he seems to have believed a story told by the first accused, but not supported by evidence. I see no reason to think that the statement of the complainant is not entitled to credit, and I therefore direct that further inquiry be made in the case, for which purpose it is transferred to the Temporary Deputy Magistrate."

The officer indicated held a fresh trial. He examined the complainant, his gumasta, and the Inspector of Police, and also several witnesses produced by the petitioner Amir Khan to support his statements. In the result he convicted the petitioner Amir Khan of cheating and theft, and the petitioner Yakub Khan of cheating and abetment of theft.

On appeal, the Sessions Judge overruled an objection taken to

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the order of the District Magistrate on the ground that it was passed without notice to the petitioners. He also overruled the further objection that the Magistrate had in fact ordered a new trial and not "further inquiry," and on the merits he supported the conviction.

On revision, it is urged that the order of the Magistrate in directing further inquiry where no further evidence was forthcoming against the accused, was *ultrâ vires*; and that "further inquiry" necessarily means an inquiry upon fresh evidence corroborative of, or in addition to, the evidence already adduced before the Court; and that a mere rehearing upon the same evidence is illegal. The Sessions Judge had overruled this objection when taken in appeal on the ground that further inquiry means inquiry into the matter alleged by the examination of witnesses, *de novo*.

The Judge apparently regards the term "further inquiry" as identical in meaning with the terms "fresh inquiry" or "re-trial." This is not its obvious meaning, and involves the conclusion that the Legislature intended to overrule the series of decisions quoted by Prinsep under s. 253 of the Code of Criminal Procedure, in which it has been held that, except in Sessions cases, after an order of discharge, no Magistrate could re-open the proceedings and commence a new trial unless evidence be forthcoming which was not before the Magistrate in the first proceedings.

It has been already observed by this Court that the true construction of the 435th—439th sections of the Code of Criminal Procedure is to be ascertained by reading them together, and by so doing the question now under consideration, viz., the meaning of the term "further inquiry," appears to us to become apparent.

Section 436 enacts that the Court of Session or District Magistrate, if it appears to them that a case is triable exclusively by a Court of Session, and that an accused person has been improperly discharged, may, instead of directing a fresh inquiry, order him to be committed for trial; or if such Court or Magistrate thinks that the evidence shows some other offence has been committed—which must mean some offence other than the offence inquired into—such Court or Magistrate may direct the inferior Court to inquire into such offence.

Section 439 confers on the High Court, as a Court of Revision, the powers of a Court of Appeal, including, among others, a power

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to reverse a finding and sentence, and to acquit or discharge an accused person, or to order him to be "re-tried," or to order that additional evidence be taken.

The term "further inquiry" means, in its primary signification, an inquiry in addition to that which has already been held—not the retaking of the same evidence, which would be a fresh inquiry or re-trial, but the taking of additional evidence; and, while there is nothing in the context of s. 437 which suggests an intention to use the term in any other meaning, the sections which precede and follow s. 437 show that the term was intended to bear its ordinary meaning. A District Magistrate, then, has no power under s. 437 to direct the re-opening of proceedings merely because, in his judgment, a Subordinate Magistrate has not rightly appreciated the credit due to the witnesses.

He should direct a "further inquiry" only where he is satisfied that such an inquiry is possible, that is to say, that further evidence is forthcoming either because the witnesses already examined have not been fully examined, or because there are other witnesses who might have been examined.

The High Court itself, which has a power that the Magistrate does not possess, namely, to order a "re-trial," is not warranted in so doing merely because the Magistrate who has discharged an accused person in a case he was competent to try and finally determine, arrived at a conclusion different from that at which the High Court would have arrived as to the credit due to the witnesses.

If in cases not falling under s. 436 a District Magistrate sees reason to think that the Subordinate Magistrate has improperly discharged an accused person by reason of his having misapprehended the law or committed a material error in procedure, the District Magistrate should, under s. 438, report the case for the opinion and orders of the High Court.

The conclusion at which we arrive as to the meaning of "further inquiry" is in accordance with the decisions of the Calcutta High Court in *in re Chundi Churn Bhuttacharjea*,(1), *Jeebunkristo Roy* v. *Shib Chunder Das*(2), and of the Allahabad High Court in *Queen Empress* v. *Hasna*(3); and it is not in-

(1) I.L.R., 10 Cal., 207. (2) I.L.R., 10 Cal., 1027.
(3) I.L.R., 6 All., 367.

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consistent with the decision of this Court in *Queen Empress* v. *Papadu*(1), which has been misapprehended by the Judge. That case merely determined that the effect of an order for "further inquiry" was to re-open the trial and to permit the Magistrate to convict for an offence included in the offence originally inquired into if he considered it established by the evidence.

The District Magistrate in the case before the Court did not satisfy himself that any further evidence would be forthcoming. His reason for directing further inquiry was that the Subordinate Magistrate had improperly refused credit to the witnesses for the prosecution. The case was not one in which any further direct evidence was procurable. The complainant alone could speak to the payment of the nine rupees to Yakub Khan. The gumasta could alone confirm the statement of the complainant as to the presence of Yakub Khan at the time when Amir Khan was at the shop, and what occurred at the shop after he left it. The cartman corroborated the evidence of the complainant by proving immediate complaint and the arrest of the petitioners at the same place. The production by Amir Khan of the note endorsed, at the house of the Inspector, was not denied and was consistent with the case of both parties.

The constable who made the arrest was not examined at either trial, but he could have given no other evidence than had been given by the cartman.

But, as we have observed, the District Magistrate did not consider whether any additional evidence was procurable nor indicate on what points "further inquiry" should be made. Moreover he transferred the case to another Magistrate, and, while we are not prepared to say that in no case is it competent to him to do so when he acts under s. 437, we consider that it was intended that the "further inquiry" should ordinarily be held by the Magistrate who made the original inquiry inasmuch as the section does not contemplate that the evidence already taken should be re-taken.

It remains to be considered whether, although the Magistrate in directing a "further inquiry" may have acted under a misconception as to the nature of the inquiry which should be held, and

(1) I.L.R., 7 Mad., 454.

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may not have satisfied himself that "further inquiry" was possible, his order should be quashed.

If, although the order was issued on insufficient grounds, it had been duly carried out and further evidence had been forthcoming, we conceive that it would have been our duty to uphold the proceedings, including the order; but inasmuch as no further evidence was procured and the petitioners have been convicted on substantially the same evidence as that which the Subordinate Magistrate who held the first trial refused to act upon, we consider the petitioners should have been again discharged, and setting aside the convictions, we direct that the fines, if levied, be refunded.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

1885. January 23. February 26.

QUEEN-EMPRESS.

against

PODIATHÁL.*

Salt Laws Amendment Act, 1882, *s.* 26, *cl.* 3; *s.* 27(*e*)—*Salt imported from foreign state, contraband.*

Section 26 of the Salt Laws Amendment Act (Madras Act I of 1882) makes it penal to import salt by any route not legally sanctioned for that purpose, and also to possess salt known to have been imported in contravention of the Salt Laws, and s. 27 of the said Act authorises, *inter alia*, the Governor in Council to make rules for regulating the import of salt by land.

No such rules having been passed in 1884, P was convicted of being in possession of salt known to have been manufactured in, and imported from, the native state of Pudukottai:

Held, that the conviction was right.

This was a case referred for the orders of the High Court under s. 438 of the Code of Criminal Procedure by J. B. Pennington, District Magistrate of Tanjore, on the 8th December 1884.

The letter of reference was as follows:—

"The accused in this case has, on her own confession, been convicted by the Sub-Magistrate under s. 26 of Madras Act I of 1882

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* Criminal Revision Case 758 of 1884.

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of being in possession of Pudukottai salt in British territory, and the fine has been levied from her.

"As I doubt if the possession of Pudukottai salt in British territory is an offence under the section, I refer the case for the orders of the High Court. I exhibit below in the form of a tabular statement the arguments that may be urged on both sides.

"The arguments that may be urged on the one side are —

"Under s. 27, cl. (*e*), Government have power of making rules for regulating the import and export of salt by sea and land. Under s. 12 of Act VI of 1844, they have the power to prescribe by what routes goods shall be allowed to pass into British territory. They have not prescribed any such routes for the importation of goods from Pudukottai territory. Nor have they made rules for the import of salt by land from that territory. There is, therefore, no legally sanctioned route for the importation of salt therefrom. Moreover, the import of salt by land is expressly forbidden by s. 3 of Madras Regulation I of 1805, so that any person who imports salt from Pudukottai would be punishable under s. 26 of (Madras) Act I of 1882. Salt so imported is dealt with in contravention of the Act and rules. It is, therefore, 'contraband' and the possessor is punishable if he knows or has reason to believe it to be 'contraband.' If it is earth-

"The arguments that may be urged on the other side are—

"Government have the power of making rules for *regulating* the import of salt, not of prohibiting it *under the clause in question*. Whether they have the power or not, they have not yet prohibited the import of Pudukottai salt *under that clause*. Nay, the prohibition imposed by s. 9 of Regulation I of 1805, upon the import of foreign salt, *i.e.*, salt manufactured out of the limits of the territory of Fort St. George (including Pudukottai salt), has been removed by Madras Act I of 1882 (*vide* schedule to the Act by which the said s. 9 is repealed). The prohibiton has been removed and no fresh prohibition has been imposed. Presumably, then, Government have sanctioned the indiscriminate import of Pudukottai salt. Section 12 of Act VI of 1844 applies only to frontiers guarded by chaukíes, which the Pudukottai frontier is not. No routes have been sanctioned for the importation from Pudukottai territory of articles, other than salt, but, of course,

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salt he has reason to believe it to be contraband, as it is a well-known fact that earth-salt is not manufactured in British territory on behalf of Government, or under license, and that no route has been legally sanctioned for the importation of Pudukottai salt. A person that possesses Pudukottai salt would, therefore, be punishable under s. 26 of Madras Act I of 1882."

the importation of those articles is not illegal. Section 26, cl. 3, pre-supposes the existence of sanctioned routes and imposes a penalty only if the salt is imported by any other route. It cannot be held to apply to a case in which no route at all has been sanctioned. Therefore salt imported from Pudukottai territory, no matter by what route, cannot be held to be 'contraband.' Section 26, cl. 3, only imposes a penalty on one who imports salt by a route not legally sanctioned; but it is very doubtful whether it can be held to amount to an absolute prohibition of import in all cases, where no routes have been prescribed at all. There is no section in this Act nor is there any in any other Act in force at present, to the effect that no person shall import salt (foreign) by any route not legally sanctioned. Section 9 of Regulation I of 1805 contained such an express prohibition and s. 3 contains a similar prohibition of the import of salt *in* the Presidency of Fort St. George. Section 3 of Regulation I of 1805 applies to cases of import and export, from one port into another, *in* the territories subject to the Presidency of Fort St. George, and not *into* such territories. The intention appears to have been to extend the Rawána system which was established by the Regulation to all salt moved within the Presidency (excluding the Pudukottai territory, &c.), whether by sea or land. This view is supported by the fact that a separate section (s. 9) existed for prohibiting the import and export of foreign salt, which means salt manufactured out of the limits of the territories subject to the Presidency of Fort St. George. This s. 9 has now been repealed. In the view thus taken, the note made in the margin of s. 3 of Regulation I of 1805 in the editions of certain compilers of Acts, that it (the section) is repealed, as regards the importation by sea of foreign salt by s. 2 of Regulation II of 1818 is evidently misplaced, while the same note made in the margin of s. 9 appears to be correct. Regulation II of 1818 merely says: 'The provisions of Regulation I of 1805,

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so far as they may affect the importation by sea of *foreign* salt, are rescinded.' It does not say expressly that s. 3 or s. 9 is repealed. But as s. 9 refers to foreign salt and not s. 3, the note ought to have been made by the compilers only under s. 9 and not under s, 3. Possession of Pudukottai salt in British territory is not. therefore, contraband."

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"For my own part, I am inclined to think that s. 26, cl. 3, cannot be easily got over by those who urge that the possession of Pudukottai salt in British territory is not an offence. It says: 'Any person who imports salt by a route not legally sanctioned for that purpose shall on conviction be punishable.'

"The salt imported is liable to confiscation together with the vessels, vehicles, materials, implements, and animals employed in its conveyance or in otherwise dealing with it. But it is still not quite clear whether the salt so imported is 'contraband,' *i.e.*, whether it is dealt within *contravention* of any provision of law, there being no provision expressly prohibiting the import of salt from Pudukottai territory, *i.e.*, if a section, similar to s. 9 of Regulation I of 1805, should come into existence.

"I beg the High Court to refer to their proceedings, No. 1955, dated 29th May 1883, in disposing of this reference.

"It may not be out of place for me to state here that in Government Order, dated 22nd October 1884, No. 1173, Revenue, the Collector of Madura was requested to refer a case of conviction for possession of Pudukottai salt to the High Court in order to obtain a ruling on the question whether the possession of Pudukottai salt in British territory is an offence or not, and copy of the Government Order was sent to the Collector of Tanjore."

The Government Pleader (Mr. *H. H. Shephard*) appeared on behalf of the Crown.

The judgment of the Court (Turner, C.J., and Brandt, J.) was delivered by

TURNER, C.J.—The accused, a woman, on her admission that she was caught by a petty officer in the Salt Department while carrying (in the Tanjore district) 15 seers and 60 tolas of "Pudukottai" earth-salt, was convicted under s. 26 of the Madras Salt Act I of 1882.

The conviction was summary, and it does not appear whether it was under cl. 3 of s. 26, for "importing" salt by a route not egally sanctioned for that purpose, or under cl. 5 for being in

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possession of salt knowing, or having reason to believe, it to be "contraband."

The conviction, if under cl. 3, could not be upheld: it was on the admissions of the accused that she was convicted, and she said that some one had given the salt to her to carry for him; she did not admit that she imported it, and it cannot be assumed that she did: it must be taken that it came into her possession after it had crossed the frontier.

Practically, the only question then is whether the salt was "contraband" under the Salt Act, for, in the absence of any explanation on the part of the accused as to why she took it, as she said, from another person, not at a price nor as a gift, seeing that she did not pretend to be able to identify such person, and that it appears to have been alleged in the charge that the salt was "Pudukottai" salt, it must be taken that she knew, or had reason to believe, the salt to be "contraband" if it was such.

The law relating to salt in this Presidency has been so often altered by repeal that it is somewhat difficult to ascertain what portions of the earlier Regulation and Acts on the subject are still extant, or to put on what remains of the Regulation of 1805 and of the Acts prior to 1882, a satisfactory construction when read with the last Act.

This reference is made by the District Magistrate of Tanjore, at the suggestion of Government, with a view to obtain an authoritative decision as to whether, as the law now stands, salt imported from the Pudukottai State into this Presidency, without the express permission of Government, is "contraband" or not.

Mr. Pennington points out that the Regulation of 1805 commences with a prohibition against the manufacture or sale, and transit, and importation of "salt" "in the territories subject to this Presidency, and also contains a special provision (s. 9) prohibiting the importation of "foreign salt,"—"under which denomination is to be deemed to be included salt of every description made or produced without the limits of the territories subject to the Presidency of Fort St. George"—"into any part of the said territories" except on account of Government or with their special sanction, or in virtue of a Regulation duly enacted and promulgated for that purpose; and the District Magistrate has, we think, rightly apprehended that, while the later section applied to all salt made outside the territories subjected to the Government of this

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Presidency, and imported into those territories, the third section applies to salt exported and imported within, that is, from one part of those territories to another. Section 9 was repealed by Regulation II of 1818 as regards import of foreign salt by sea only, and this fact lends support to the construction adopted by the District Magistrate, inasmuch as the provisions of the Regulation of 1805 were left standing as regards foreign salt imported by land. Again, Act VI of 1844 dealt, *inter alia*, with foreign salt imported by land from the territories of native chiefs not subject to the jurisdiction of the Courts and Civil authorities of this Presidency. Section 12 of this Act authorized the Governor in Council to prescribe by what routes salt, *inter alia*, should be allowed to pass out of any such foreign territories as was described in s. 7 of the Act. The effect of the repeal of ss. 6 and 7 of the Act may be either to leave foreign territory undefined or to leave the definitions untouched for the purposes of s. 12, but this is immaterial, for full power is given by Act I of 1882.

Section 9 of Regulation I of 1805 was eventually repealed by Madras Act I of 1882.

We may then, so far as the present case is concerned, confine our attention to the latter Act.

It is noticeable that this Act does not in express terms prohibit the importation of salt by land from native States by any other than a prescribed route, but it declares it to be an offence (s. 26, cl. 3) "to import salt by any route . . . . . not legally sanctioned for that purpose," and so implies a prohibition against such importation generally.

The Act, moreover, as we have before observed, empowers the Government, *inter alia*, to frame rules " for regulating the export and import of salt by sea and land," s. 27 (*e*), and so impliedly gives to the Government power to prescribe rules for the import of salt by land from foreign territories.

It was assumed that such rules would have been framed prescribing, *inter alia*, routes for the importation of salt from any place outside the Presidency from which it is or might be imported. But, in the absence of such rules, the implied prohibition contained in s. 27 (*e*) of Madras Act I of 1882 nevertheless takes effect.

The conviction in the case referred to us is then, in our opinion, good in law.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

1885. February 13.

ARUNÁCHALA (PLAINTIFF), APPELLANT,

and

PANCHANÁDAM AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 13—Hindú Law—Res judicata—*Representation of estate by Hindú widow—Decree in favor of widow—Suit by reversioner—Admission by widow subsequent to decree not binding on reversioner.*

In 1877, S claiming to be the adopted son of M, sued A, the widow of M, to recover his estate. A denied the adoption. S failing to adduce any evidence, the suit was dismissed under s. 158 of the Code of Civil Procedure, 1877. In 1882 by an agreement made between A and S, A acknowledged the title of S as adopted son of M. A having died, a suit was brought against S by a reversioner of M to recover the estate of M :

Held, that S was estopped by the decree in the former suit from setting up his claim as adopted son against the plaintiff, and that the subsequent agreement between A and S did not affect plaintiff's right.

THIS was an appeal from the decree of W. F. Grahame, District Judge of South Tanjore, dated 18th July 1884, confirming the decree of K. Krishna Ayyangár, District Múnsif of Tiruvadi, in suit 195 of 1883.

The plaintiff, Arunáchala Pillai, sued to recover from the defendants, Panchanádam Pillai and four others, the estate of Muttu Pillai with mesne profits. Muttu Pillai died in 1874 without issue, and was succeeded by his widow, Alamélu, who died in 1882. Plaintiff alleged that, on the death of Alamélu, Kottai Ammai, the adoptive mother of Muttu Pillai, was entitled to succeed to the estate for life, and that she, by a registered deed, dated 13th December 1882 (exhibit A), conveyed to plaintiff, who was the divided paternal uncle's son and next heir of Muttu Pillai, her life interest. The defendants were alleged to be in possession of the estate. The defendants pleaded that Shunmugam Pillai, defendant No. 3, was adopted by Muttu Pillai, and was in sole

* Second Appeal 927 of 1884.

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possession of the estate. In suit No. 389 of 1877, Shunmugam Pillai sued Alamélu to recover the estate of Muttu Pillai, claiming as adopted son. Alamélu denied the adoption. That suit was dismissed under s. 158 of the Code of Civil Procedure, 1877, because the plaintiff's pleader was not ready to proceed and adduced no evidence.

On the 28th of July 1881, by a written agreement made between Alamélu and Shunmugam, Alamélu admitted that her previous denial of the adoption was not true and that Shunmugam was the adopted son of Muttu Pillai.

The second issue was whether the alleged adoption of Shunmugam was true and valid as against plaintiff. The Múnsif found that the adoption was clearly proved and held that the decree in suit 389 of 1877 was no bar to Shunmugam's plea, because plaintiff did not claim through Alamélu, but as a reversioner of Muttu Pillai. The suit was dismissed.

On appeal the District Judge confirmed the Múnsif's finding as to the fact of adoption, and remarked that there was no proof of any consideration for exhibit A.

Gopálácháryar for appellant.

Mr. *Wedderburn* for respondents.

For the appellant it was contended that the decree in the former suit estopped the respondent from setting up his adoption.

For the respondent it was argued (1) that the appellant did not claim "under" Alamélu within the meaning of s. 13 of the Code of Civil Procedure, but "under" Muttu Pillai. (2) That the question of adoption had not been heard and finally decided in the former suit. (3) That if appellant claimed "under" Alamélu and was entitled to rely on the decree in her favor, he was equally bound by her subsequent admission in favor of respondent's title, and that, if necessary, the case should be remanded to try that and other questions raised in the suit.

The judgment of the Court (Turner, C.J., and Brandt, J.) was delivered by

TURNER, C.J.—Shunmugam Pillai sued to establish his right as adopted son of Muttu Pillai, and to recover the estate from the widow, Alamélu. He failed to adduce evidence to prove his title, and the suit was dismissed.

The widow represented the estate, and if she defended the suit

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ARUNÁCHALA v. PANCHANÁDAM.

bonâ fide, the decision whether allowing or disallowing the right claimed would have bound all persons claiming in succession to the widow—*Krishna Behari Roy* v. *Brojeswari Chowdranee*.(1)

The circumstance that the widow afterwards recognized the claim cannot affect persons having rights in succession to her. The appellant is the next reversioner in succession to the mother of Muttu Pillai, and it is immaterial whether or not consideration was given for exhibit A. He is entitled to succeed. The decrees of the Court of First Instance and appeal are reversed and the claim decreed with costs in all Courts. The amount of mesne profits will be ascertained in execution of decree.

APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

1885. February 23.

QUEEN-EMPRESS

against

GOUNDADU.*

Act I of 1866 (*Madras*), *s.* 22—*General Clauses Act*, 1868, *s.* 5.

Section 5 of the General Clauses Act, 1868, does not authorize a Cantonment Magistrate to award rigorous imprisonment in default of payment of a fine imposed under Act I of 1866 (Madras).

ON the 3rd of February 1885, Lieutenant-Colonel G. H. Oakes, Cantonment Magistrate at St. Thomas' Mount, sentenced Goundadu to rigorous imprisonment for eight days for failing to pay a fine of Rs. 6, imposed upon him for keeping swine within the cantonment without permission, contrary to the provisions of s. 14, ch. III of the Cantonment Rules passed under s. 17 of Act I of 1866 (Madras).

This order, it was stated, was passed under s. 5 of the General Clauses Act, 1868. A warrant of distress had been issued and return made that Goundadu had no property from which the fine could be levied.

The case was referred for the orders of the High Court by J. F. Price, District Magistrate of Chingleput, on the 13th February 1885, on the ground that the order was contrary to the

(1) L.R., 2. I.A., 283.

* Criminal Revision Case 92 of 1885.

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provisions of s. 22 of Act I of 1866 (Madras), which provides imprisonment without labour as the penalty for non-payment of a fine.

QUEEN EMPRESS v. GOUNDADU.

Counsel were not instructed.

The Court (Brandt, J.) delivered the following

JUDGMENT :—The sentence is illegal. Section 22 of Act I of 1866 provides that in default of realization of a fine imposed for breach of any rule or regulation made under the provisions of s. 17 of the said Act, by reason of no movable property belonging to the offender being found, the offender shall be liable "to be imprisoned without labour" for any term not exceeding one month.

Section 5 of the General Clauses Act extends the provisions of certain sections in the Penal Code and Criminal Procedure Code "to all fines imposed under the authority of any Act hereafter to be passed" unless such Act contains express provision to the contrary.

Seeing that the Cantonment Act was passed two years prior to the General Clauses Act, the provisions of s. 5 of the latter Act do not apply to the former, and the fact that rules and regulations framed under clauses 4 to 11 of the Cantonment Act did not receive the force of law until after 1868 (if this is so), can make no difference. So much of the Cantonment Magistrate's order as imposed rigorous imprisonment is set aside.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

1885. February 13.

26 Mad. 590.

SUBBU (DEFENDANT), APPELLANT,

and

VASANTHAPPAN (PLAINTIFF), RESPONDENT.*

Rent Recovery Act, s. 1—Inámdár—Regulation XXV of 1802.

Section 1 of Madras Act VIII of 1865 does not confine the term "inámdár" to such inámdárs as are registered :—*Held*, therefore, that the purchaser of an inám village, who had not got his name registered as inámdár, was not thereby debarred from enforcing the provisions of the Act against a tenant for arrears of rent.

Valamarámá v. *Virappa* (I.L.R., 5 Mad., 145) observed upon.

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* Second Appeal 883 of 1884.

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THIS was a summary suit brought, under s. 40 of the Rent Recovery Act, to prevent the defendant, who had purchased an inám village, from selling the plaintiff's interest in certain land for arrears of rent claimed by the defendant. The plaintiff urged that the defendant could not enforce the provisions of the Rent Recovery Act, inasmuch as he was not registered as inámdár of the village.

The Sub-Collector of Salem held that, as plaintiff had accepted a pattá from defendant, he could not resist the defendant's claim for rent, and dismissed the suit.

On appeal, the Acting District Judge (C. W. W. Martin) reversed this decree on the ground that defendant had no right to proceed under the Rent Recovery Act, until he was registered as inámdár of the village, citing *Valamarámá* v. *Virappa.*(1)

The defendant appealed to the High Court.

Ramasámi Mudaliar for appellant.

Respondent was not represented.

The Court (Turner, C.J., and Brandt, J.) delivered the following

JUDGMENT :—The appellant, according to the statement of his vakíl in this Court, purchased seven-eighths and his younger brother purchased one-eighth of the inám for their joint benefit as members of an undivided family. By their purchases, they became inámdárs, and s. 1 of the Rent Recovery Act relating to inámdárs does not confine the term "landholders" to such inámdárs as are registered. Since the date of the decision in *Valamarámá* v. *Virappa,*(1) it has been held that the provisions of Regulation XXV of 1802, s. 8, were intended only for the protection of Government revenue and authorize only the Government to question the validity of an unregistered alienation of a part of a zamíndárí in so far as it prejudices the claim for revenue. The respondent did not, it appears, take exception to the pattá on the ground that only one brother was represented as lessor, but this defect should be corrected. The decree of the Appellate Court is set aside and a re-hearing of the appeal ordered. The appellant's costs of this second appeal will abide and follow the result.

(1) I.L.R., 5 Mad., 145.

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APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

DEVU (DEFENDANT No. 1), APPELLANT,

and

DEYI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1885. March 5, 7.

12 Mad. 462.

Aliyasantána law—Yajaman—Family compact.

The question, whether, according to the Aliyasantána usage obtaining in South Canara, the senior member, male or female, or only the senior female, is the *de jure* yajaman (manager) of the family is not concluded by authority and cannot be determined without evidence of usage.

By a family compact between all the members of an Aliyasantána family in settlement of disputes in the family, it was agreed that the senior male for his life should enjoy the possession of the family land and protect the females:

Held, that the senior female, assuming that she was *de jure* yajaman, could not arbitrarily revoke this arrangement.

THIS was an appeal from the decree of J. W. Best, District Judge of South Canara, dated 26th November 1883, confirming the decree of the District Múnsif of Múlki (Bábu Ráu) in suit No. 38 of 1880.

The facts necessary for the purpose of this report appear from the judgment of the Court (Muttusámi Ayyar and Hutchins, JJ.).

Srinivása Ráu for appellant.

Rámáchandra Ráu Saheb for respondents.

JUDGMENT.—The suit which has given occasion to this second appeal was brought by the respondents, Deyi and Ammu, two females of an Aliyasantána family in South Canara, against the appellant, Devu Shetti, the senior male member, and two others, his wife and son, to remove Devu Shetti from his position as yajaman and to recover the property belonging to the family.

Of the averments contained in the plaint, whereby fraud and misconduct were imputed to the appellant, several may be dismissed from our consideration.

As against defendant No. 2, the appellant's son, it was alleged that property belonging to the family had been alienated to him

* Second Appeal 322 of 1884.

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without just cause. This allegation, it is found, has not been proved, and the respondents have not objected to the finding on second appeal.

With reference to items of land II, IV, V and VI and the well, VII, which are now in the possession of the appellant's wife, defendant No. 3, it was asserted that they formed part of the property belonging to the respondents' family alienated by the appellant in fraud of its right. The Judge has found that the respondents have failed to prove this imputation, and this finding also they have not impugned. With reference to this part of the respondents' claim, however, the Judge observes that it is impossible to say with confidence that the respondents' contention that the appellant maliciously acknowledged the title of defendant No. 3 is false. If the appellant is the lawful yajaman, a vague suspicion, such as the above, founded on a fact which is of itself equivocal, cannot be accepted either as proof of dishonesty or as a sufficient ground for removing him from a position to which he is entitled by virtue of his birth.

Again, the Judge observes that the appellant has not acted *boná fide* in repudiating his liability to maintain the respondents on the ground that the kárár (A) proved division between them, whilst that document proved nothing more than a provisional arrangement, which had been made, as a matter of convenience, for the separate enjoyment of family property. Although it does not prove partition, it may well be that the appellant was mistaken as to its legal effect or as to the interpretation which ought to be put upon it.

Dismissing then the imputation of fraud and malversation as not proved, the substantial questions for decision are—(1) whether, according to the Aliyasantána usage obtaining in South Canara, and by which the parties to this appeal are governed, it is the senior male, or female, or only the senior female that is entitled to be the yajaman of the family, and (2) whether, assuming that the eldest female is the yajaman *de jure*, the karár (A) is one which she is entitled to countermand at her pleasure.

As to the first question the Judge has decided it in favor of the senior female, but it is argued before us that this view is not in accordance with the usage prevailing among the people, who follow this special law of inheritance. It becomes, therefore, neces-

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sary to see whether the question has been set at rest by decided cases and the authorities which are mentioned by the Judge, and to examine into the history of the usage in so far as it can be ascertained from judicial decisions and from the writings of those, qualified by special experience in, and knowledge of, the district, to express an opinion on the subject.

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The first account of the usage to be found among the papers in this Court is that of Mr. F. M. Lewin, written in 1830 and forwarded by Dr. Burnell to this Court with his letter, dated the 2nd April 1873. Mr. Lewin observes: "The elder sister or brother manages the affairs of the Aliyasantána family. If the rest do not choose to live with them, they obtain separate establishments and set up housekeeping for themselves." Adverting to the course of judicial decisions in the district, Dr. Burnell observes that "until 1842, those decisions gave the actual management to males and allowed partitions, though not recognizing them as legal. In 1843 in the case of *Dera Pujari* v. *Ackoo*, the so-called Bhutálá Pándiya was first produced and division allowed. This continued till 1863 when the people considered that the decision in *Munda Chetti* v. *Timmaju Hensu* (1) settled the custom . . . . It is only since that decision that there have been claims to management by Aliyasantána females; from all previous decisions it would appear that the males alone were in actual management."

Referring to Bhutálá Pándiya, Dr. Burnell remarks that: "It is avowedly a missionary tract and printed without the consideration which a genuine edition requires." The passage which is to be found in this treatise pertinent to the question before us and to the question of partibility is thus rendered in *Timmappa Hegade* v. *Mahalinga Hegade* (2)—"The children of the senior or junior maternal aunts, the eldest female, the eldest male, shall alone stand (entitled) to Ali Uli, but the children of the elder and younger can have no reason to enter into a division." Ali means death, Uli survivorship, and the meaning of the compound is the inheritance or property arising from death and survivorship. "The other living persons shall act in union (with them). Should a misunderstanding arise between the elder and younger sisters, the elder shall provide the younger with a house and with household

(1) 1 M.H.C.R., 380. (2) 4 M.H.C.R., 30.

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articles and have the management herself, having a right to Uri Siri." Uri means fire and Siri means prosperity, and the compound means a right to what is good and bad, or the assets and liabilities of the family. "Thus," the text goes on to say, "Bhutálá Pándiya made a rule and prohibited division of property. Bhutálá Pándiya wrote and added the rule that to the pattapatti (dignity or pattam) wherever it exists, the Áli Uli man (the surviving heir mentioned above) shall alone be entitled and not the other santána (offspring), who will be entitled where the Uli (heir) is dead."

It will be seen that the senior female is mentioned in the text first in connection with yajamanship, and that in connection with pattam or dignity, a female is excluded from succession by reason of her sex. We do not think it safe to hold that the order in which the eldest female and the eldest male are named is conclusive. It is also necessary to add that this version differs from that accepted by Mr. Anderson, and mentioned in a note to *Munda Chetti* v. *Timmaju Hensu*.(1) According to the last-mentioned version: "It is the eldest child of the eldest sister, be it male or female, that is the yajaman and entitled to hold the family property which is indivisible, the other members of the family being subject to the authority of such female or male manager." It is scarcely necessary to remark that this version is clearly in favor of the senior male, and the exact meaning of this part of the passage was not decided in *Timmappa Hegade* v. *Mahalinga Hegade*. (2)

The next writing to which we may refer is Strange's Manual published in 1856, section 392. It is stated that in its details the law of Aliyasantána corresponds with that of Marumakatáyam, save that the principle that inheritance vests in females in preference to males is better carried out in Canara, where the right of management vests ordinarily in females, whilst in Malabar males commonly possess it. This passage no doubt supports the Judge's view, but, as an authority, it is a mere opinion expressed in a general way in contrasting two special systems of inheritance obtaining on the Western Coast.

As to *Munda Chetti* v. *Timmaju Hensu*,(1) it decided that, under the Aliyasantána law, no compulsory partition of family property

(1) 1 M.H.C.R., 380. (2) 4 M.H.C.R., 30.

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could be permitted. To this extent it is binding authority. It was also pointed out in this case that the decisions of the local tribunals in original suit 376 of 1833 and appeal suit 82 of 1843 rested either on the express agreements of the parties or on notions of expediency. It is, therefore, also an authority for the position that, where a partition is made with the consent of all the members of the family, it is valid, but that notions of expediency cannot be accepted as the basis of judicial decisions. It must, however, be observed that the question of title to yajamanship was neither raised nor decided in this case. In so far as the version of Bhutálá Pándiya to which the Court then referred is concerned, it is the version suggested by Mr. Anderson, which is in favor of the eldest child, be it male or female. We are aware that the Court then observed that in Canara females alone are "recognized as the proprietors of the family property," and that Mr. Justice Holloway referred also to the authority of Mr. Strange and quoted with approval his statement that the doctrine that all rights to property are derived through females is more consistently carried out in Canara than in Malabar. But it must be borne in mind that these general observations were made without especial reference to the question now at issue, but with reference to the question of partition among males and females, which cannot certainly be reconciled with the principle that all rights to property are derived from, and transmitted through, females. It may well be that a male may be yajaman, though he may not be permitted to insist on partition lest the family property may in part become his separate property liable to be diverted from the family by alienation, and even the proposition that females are the sole proprietors of family property can hardly be considered strictly accurate. How are we then to account for the right to maintenance vesting in males? It seems to us that it would be more correct to say that the property vests in the whole family, consisting of males as well as females, though, from the fact that marriage is not a legal institution, influencing the devolution of property, all rights are derived from, and transmitted through, females.

The next case to which the Judge has drawn attention is that of *Timmappa Hegade* v. *Mahalinga Hegade*(1) already referred to. The point decided in this case was that a pattam or dignity devolves

(1) 4 M.H.C.R., 30.

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on the eldest male in the family, and that, in selecting the successor, we are to look to seniority by birth and not to seniority of stock. The contest was between two male members and not between male and female members. The ground of decision is that the version of Bhutálá Pándiya accepted by Mr. Anderson is not correct and that the distinction between one branch and another in regard to an individual right is hardly reconcilable with the continuing *status* of non-division and the equal community of interest of all the branches. This case is no authority on the question before us, save to the extent that it is not safe to rely on the version of Bhutálá Pándiya's text accepted by Mr. Anderson.

Another case on which the Judge relies is *Tirumali* v. *Dhurma Pujari and others* (second appeal 484 of 1870). In that case the plaintiff was the senior female and the defendants were the senior males, and the ground of action was that, as senior female, the plaintiff was entitled to the management of family property. The District Múnsif held that the senior female and the senior male were entitled together to be yajamans. The Principal Sadr Amín, however, observed on appeal that the rule "that the eldest surviving member, whether male or female, was entitled to be the yajaman was too well established to require to be discussed." On special appeal the High Court remitted an issue whether, according to the true understanding of the Aliyasantána law, the right of actual management and dealing with property is resident in, and exercised by, the women in Canara, and directed the Principal Sadr Amín to take evidence as to the general rule of law and as to any modification of that rule, which may have taken place by custom. At the same time the District Judge was called upon to forward, for the consideration of the High Court, copies of judgments passed in the District in regard to the matter then in contest.

The District Judge forwarded the judgments in appeal suit 221 of 1830, 82 of 1843, original suit 204 of 1865 on the file of the Udipi Múnsif, original suit 65 of 1864 on the file of the Mulki Múnsif, appeal suits 711, 764 and 768 of 1866, original suit 66 of 1864 and appeal suit 259 of 1865, but he also stated that the question then under discussion was directly dealt with in none of them. He went on to state, however, in the letter from which we have already quoted that "at present there can be no

doubt that people of all the castes that follow the custom have entirely accepted the rule laid down in *Munda Chetti* v. *Timmaju Hensu;* that, since receiving the order of the High Court, he asked a large number of persons as to their practice, and that the answer in every case was that it was in accordance with the rule mentioned in the judgment." He added that the decision in *Munda Chetti* v. *Timmaju Hensu* practically settled the custom and that, accordingly, the eldest member of the family, whether male or female, claimed the management, and that the rule would not have found so ready an acceptance had it not agreed with the custom of the people. Thus, the observation of the highest local tribunal was in favor of the rule, that the eldest member, whether male or female, was the yajaman. But to the issue referred by the High Court, the Principal Sadr Amín returned a finding to the effect that the right of actual management was resident in, and exercised by, the women in Canara. With these materials before it, the High Court observed that they were still dissatisfied, that the question was whether, in practice, the written text of the law had been so modified as to be adequate proof of abolition by derogation, but that the finding of the Principal Sadr Amín was based mainly upon that very text: "The Civil Judge, however," they continued, "goes further and declares that the doctrine must be right because it has received a ready acceptance among the people. It seems useless to dispute the matter further, and for the present case, at all events, we must accept the finding." The reservation shows that the decision was not intended to conclude the question finally. It must also be noted that the doctrine which found ready acceptance among the people according to the Civil Judge was not that found by the Subordinate Judge in direct opposition to his own previous unhesitating statement of the well understood usage, viz., that the actual right of management was in the women, but that it was the eldest member, whether male or female, who was entitled to be yajaman.

We are, therefore, unable to concur in the opinion of the District Judge that the question before us, viewing it as a matter of usage, is concluded by authority. The Judge observes that management by males is detrimental to the interest of the family and that their natural instincts are in conflict with the duty which they owe to the family. The question is not merely one of expediency.

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In the neighbouring District of Malabar, the general rule is in favor of management by males. In this connection there are two other matters which will require to be considered when evidence is taken as to actual usage.

The first is the observation made both by the Judge and the District Múnsif that, from the accession of the British rule in Canara down to a recent date, not a single varg (holding) was registered in the name of a female. The other is the argument urged at the bar that Aliyasantána females recognize marriage as a binding contract for certain purposes, though it has no influence on the law of inheritance, and that, unlike the women in Malabar, they often leave their family houses and reside with their husbands. If this is a fact, it may possibly have some weight in connection with the question of usage, or at all events of expediency.

Our conclusion on the principal question is that it is still *res integra*, and that it is impossible to come to a satisfactory conclusion regarding it without evidence of usage.

The other question for decision is whether, assuming that the respondents are entitled as the eldest females to actual management, they are at liberty to set aside the muktiyar karár (A) and to recover the land mentioned therein on the ground that they are the lawful yajamans. This document recites that there was a controversy between the appellant and Kalappa Shetti on the one side and the respondents on the other as to the right of the former to give away land No. 17 of Nandikur village to one Charappa Shetti, and a compromise was effected on the suggestion of mediators, and it purports to have been executed pursuant to that compromise by Devu Shetti, the appellant, and Kalappa Shetti to Deyi and Ammu, the respondents. It then goes on to state that, with the respondents' consent, this appellant and his brother are to enjoy the land in equal shares during their lifetime, to pay the Government assessment and protect the respondents, but that they are to have no right to sell, mortgage or lease it out on múlgaini without the respondents' consent. The Judge observes that the document evidences only a temporary arrangement made for separate enjoyment of family property and that the mere fact of its having been in force for a period exceeding twelve years is no bar to the respondents resuming possession if they are otherwise lawfully entitled. We are unable to concur in this opinion. All the members of

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the family for the time being appear to have been parties to the arrangement, which purports to have been made in adjustment of a dispute among them for preserving the family peace and protecting the interests of all the parties concerned and intended to be in force during the appellant's lifetime. The arrangement is, in our opinion, a family arrangement made by all its members and intended to be in force during the appellant's life, and even assuming that the senior respondent is the lawful yajaman, we do not think that the karár can be arbitrarily set aside by her. We are informed by the vakíls on both sides that the karárnáma includes all the property in dispute in this appeal, and the finding that the respondents are not at liberty to revoke it renders it unnecessary to determine the more important and more difficult question, whether, if the karár did not stand in their way, the respondents are entitled to assume the management at their pleasure. No issue, therefore, need be remitted as to usage. The appeal must be allowed and the decree of the District Court reversed so far as it decrees any lands to the plaintiffs, and the plaintiffs' suit dismissed.

In the circumstances we think it will be sufficient to require the plaintiffs to pay the appellant's costs of this appeal.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1885.
January 30.
February 24.

RÁMÁNÚJA and others (Plaintiffs), Appellants,

and

DEVANÁYAKA and others (Defendants), Respondents.*

15 Bom. 309.
18 All. 131.
27 Mad. 85.
11 C.W.N. 690
34 Cal. 666.
34 Mad 55
36 All 312

Civil Procedure Code, s. 26—Misjoinder—Amendment of plaint—Specific Relief Act, s. 42—Declaratory suit.

Suit by six plaintiffs praying for a declaration that certain proceedings of a District Temple Committee removing them from office as trustees of a temple were illegal.

Defendants pleaded that the suit would not lie because of misjoinder and also because further relief might have been sought :

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* Second Appeal 768 of 1884.

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RÁMÁNÚJA v. DEVANÁYAKA.

Held, that under s. 26 of the Code of Civil Procedure the plaintiffs could not sue jointly and that the plaint should be returned for amendment, one of the plaintiffs to be allowed to use it as his own:

Held, also, that unless there had been an actual ouster from office, a declaratory suit would lie.

THIS was an appeal from the decree of J. Hope, District Judge of South Arcot, reversing the decree of Áthiappa Chettyar, Subordinate Judge at Cuddalore, in suit No. 5 of 1883.

The plaintiffs, Rámánújá Cháryar and five others, sued Devanáyaka Mudaliar, the President of the District Devasthánam Committee, and 26 others, for a declaration that certain proceedings passed on the 23rd December 1882 by the defendants 1—15 removing the plaintiffs from the office of dharmakartas or trustees of the pagoda of Trivindipúram were invalid. Defendant No. 1 and others pleaded, *inter alia*, that there was a misjoinder of causes of action and that a declaratory suit would not lie.

The Subordinate Judge held that as the plaintiffs sought to cancel one and the same order, there was no misjoinder and that a declaratory suit would lie and, on the merits, decreed for the plaintiffs.

On appeal the District Judge held that the order dismissing the plaintiffs must be held to be valid until set aside and therefore that the plaintiffs being no longer joint trustees could not sue jointly on the ground of having a common cause of action.

The District Judge also held, for the same reason, that plaintiffs could not consider themselves to have been in office when the suit was filed and that they were therefore bound to sue for further relief and could not ask for a declaration merely under s. 42 of the Specific Relief Act. On these grounds the suit was dismissed.

The plaintiffs appealed to the High Court on the following grounds:—

1. The District Judge was wrong in holding that the plaintiffs could not have sued jointly. They were joint trustees appointed by a single order, and the order now sought to be set aside was passed as against them all, and was based on grounds that applied equally to all and no one trustee has suffered an injury which is not common to all the others.

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2. The District Judge was also wrong in holding that plaintiffs' suit for a declaration will not lie. Plaintiffs do not seek to get an office or property for the first time in their own right from strangers. They were in office and are still in possession of the properties connected with the temple, and if the order which they assert to be invalid and which is the only impediment to their discharging their duties be set aside, they are in a position at once to resume their office. They are therefore not in a position to seek for further relief.

The Advocate-General (Hon. *P. O'Sullivan*) and *Gopáláchâryar* for appellants.

Mr. *Shephard* and *Chellaya Pillai* for respondents.

Counsel for appellants referred to s. 26 of the Code of Civil Procedure, *Booth* v. *Briscoe*(1) and to *Chinna Rangaiyangar* v. *Subbraya Mudali*.(2)

Counsel for respondents argued that s. 26 of the Code of Civil Procedure differed from the English rule and that plaintiffs if dismissed could only sue for damages and not for re-instatement.

On the 24th February the Court (Turner, C.J., and Muttusámi Ayyar, J.) delivered judgment as follows :—

JUDGMENT.—The appellants are the dharmakartas of a Vishnu Temple in the District of South Arcot and the respondents are the members of the Committee appointed for the District under Act XX of 1863 having jurisdiction over the appellants. On the 22nd December 1883 respondents 1 to 11, 13 to 15 and the second defendant removed the appellants from the office, as is alleged, of Trustees. The suit from which this appeal arises was brought jointly by all the appellants to have it declared that their removal from office was without just cause and null and void. The Judge considered that the removal of each appellant, if illegal, was a distinct wrong and that the appellants were bound to have asked to be re-instated in their office, and upon these grounds he dismissed the suit with costs, observing that the appellants were entitled neither to sue jointly nor to ask for merely a declaratory decree. We agree with the Judge that the appellants are not at liberty to sue together, for the wrongful dismissal of each of them is a

(1) 2 Q.B.D., 496. (2) 3 M.H.C.R., 338.

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RÁMÁNÚJA v. DEVANÁYAKA.

distinct wrong forming a separate cause of action whilst the persons entitled to join in one suit as plaintiffs under s. 26 of the Code of Civil Procedure are persons in whom the right to the relief claimed is alleged to exist, whether jointly or severally or in the alternative, in respect of *the same cause of action.* The learned Advocate-General who appeared for the appellants quoted *Booth* v. *Briscoe*,(1) and referred to the rule framed under the Judicature Act, Order XVI, Rule I. The words of limitation, viz., in respect of the same cause of action, which are found in s. 26 of the Code of Civil Procedure, are not to be found in the rule cited, and the absence of such words of limitation is noticed as an argument in favour of the plaintiffs in the case on which reliance is placed. We do not, however, think that the Judge was right in saying that the appellants were bound to have asked to be re-instated in their office and that a declaratory suit could not be maintained under the proviso of s. 42 of the Specific Relief Act. This provision of law no doubt directs that the Court shall not make a declaration of title when the plaintiff, being able to seek further relief than a mere declaration, omits to do so. But, if A is in possession of certain property and B denies his title and requires A to deliver it to him, A may claim a declaration of his right to hold the property—(Illustration G). It follows that if A is in possession of a certain office and B requires him to surrender it, A may sue for a declaration of his right to continue in it, unless he has actually been ejected from the performance of its duties, or the enjoyment of its emoluments. Possession, whether it is of property or of an office may be regarded either as a physical fact, or in contemplation of the legal right to it, and it is in the former sense it should be understood in coming to a finding under s. 42 as to whether the plaintiff is, or is not, able to seek further relief. It may be observed that the term relief presupposes the actual withholding of the fruit of the right of which a declaration is sought, and not its mere denial. A declaratory decree is all that a plaintiff requires when he has no need of the assistance of the Court to replace him in possession. The Judge is in error in failing to make a distinction between offices from which the office-bearer for the time being may be lawfully ejected directly he is dismissed, and the offices which the office-bearer may persist in

(1) 2 Q.B.D., 496.

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holding, until he is ejected by a Court of Justice though at his own risk and subject to the legal consequences of such conduct.

The result is that the objection to the misjoinder of the plaintiffs ought to prevail and the objection to the suit being for a mere declaration of right ought to be overruled. As the misjoinder of plaintiffs is only a plea in abatement and rather to the form than the substance of the action, it ought not if possible to defeat the action altogether, unless the defendant has been prejudiced in this case. The plaint may be amended as if it were brought by some one of the plaintiffs in respect of his removal only, and we see no objection to the amendment. It is provided by s. 26 of Act XIV of 1882, that "Judgment may be given for such one or more of the plaintiffs as may be *found to be entitled* to relief, for such relief as he or they may be entitled to, without any amendment." This provision is obviously based on the principle that the misjoinder of a party as plaintiff to whom the relief claimed could not be awarded whilst there are others to whom it might be awarded, is a mere defect of form which is not fatal to the action. The contention of the appellants' Counsel that the plaint ought to be treated as that of the first plaintiff or any one of the other plaintiffs is, we think, entitled to weight. We would remit the suit for disposal on the merits and direct the Judge to return the plaint for amendment allowing one of the plaintiffs to use it as his own and requiring the others to put in separate plaints. The costs incurred hitherto will abide and follow the result.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884. December 11. 1885. March 16.

NATHUD BI (COMPLAINANT),
against
JAFAR HUSAIN (DEFENDANT).*

10 Mad. 10

Army Act, 1881 (44 & 45 *Vict.*, *c.* 58), *Section* 145.

Section 145 of the Army Act, 1881, is not applicable to soldiers of Her Majesty's Indian forces.

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* Criminal Revision Case 485 of 1884.

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NATHUD BI v. JAFAR HUSAIN.

THIS was a case referred to the High Court, under s. 432 of the Code of Criminal Procedure, by Colonel T. Weldon, Chief Presidency Magistrate of Madras.

The case was stated as follows:—Complainant holds an order duly granted by a Magistrate under s. 488 of the Code of Criminal Procedure directing defendant to pay her a monthly sum of rupee one and annas eight for the maintenance of defendant's illegitimate child. The order not having been complied with, complainant has taken proceedings in the Presidency Magistrates' Court to enforce it.

The case was posted for hearing on the 2nd May 1884, and the following order was then passed:—

Complainant on 3rd March 1884 obtained an order from a Presidency Magistrate (Mr. Mir Ansar-ud-din) directing defendant, who is a sepoy of the 22nd Regiment Madras Native Infantry, to pay her one rupee and eight annas monthly for the maintenance of defendant's illegitimate child, named Hamida Bi.

The order not having been complied with, complainant now seeks to enforce it by process of this Court.

Defendant being a soldier of the regular forces, a copy of the order in question should, when passed, have been submitted through the Local Government for the orders of a Secretary of State in accordance with s. 145 of the Army Act. That course will now be adopted, and it is ordered accordingly.

(Signed) T. WELDON, Colonel,
Chief Presidency Magistrate.

As appears from the proceedings of Government, dated 10th July 1884, No. 3312, Military, the Local Government referred the matter to the Military authorities who, acting on the opinion of the Judge Advocates-General of the Bengal and Madras Army, state that "the whole tenor of s. 145, Army Act, shows that it has no relation to Native soldiers."

In this opinion the learned Advocate-General of Madras "concurs."

Broadly stated s. 145, Army Act, provides (1) that a soldier of the regular forces shall be liable for the maintenance of his wife and of his children, legitimate and illegitimate, to the same extent as though he were not a soldier, but imposes conditions to prevent this purely civil liability being enforced in such a manner

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as would weaken the defensive power of the State by withdrawing a fighting man from the ranks, or by depriving him of the means of discharging his duty efficiently. At the same time provision is made that just claims against a soldier shall be satisfied in a manner consistent with the exigencies of military service, so in this view (2) it shall be the duty of the Secretary of State, on being furnished with a copy of any decree or order passed against a soldier for the maintenance of such soldier's wife or children, to arrange that a certain portion of the soldier's pay shall be appropriated to the satisfaction of the decree, and (3) where a proceeding is instituted against a soldier to enforce his liability, if the soldier be serving out of the jurisdiction of the Court having cognizance of the complaint, a sufficient sum must be lodged with the process to pay the expenses of his attendance before the Court; and in no case can any process be effective if the soldier is under orders for foreign service.

The Magistrates have already been instructed (G.O., dated 28th September 1881, No. 5149, Military, and 8th October 1881, No. 2070, Judicial,) that Natives of India are "Soldiers of the Regular Forces" within the meaning of the Army Act.

This ruling was passed on a reference made by the Government of Bombay to the Government of India in respect to the illegal purchase of a medal from a sepoy of the 24th Regiment (Bombay) Native Infantry, the Magistrate before whom the charge was laid stating that he was not aware of any provision of law enabling him to deal with persons who buy necessaries from the Native soldiery. The Judge Advocate-General of the Army in Bengal thus reviewed that case:—

"Upon a proposal being made for the passing of a special enactment to suit such a case, the Government of India consulted the Legislative Department respecting the necessity for this measure, with the result that the Legislative Department expressed the opinion that s. 85 of the Mutiny Act (38 Vict., c. 7) is applicable to a case of purchasing necessaries, &c., from Native soldiers of Her Majesty's Indian Army, for reasons that were given. The Government of India, adopting this opinion, communicated the decision, by letter from the Military Department, No. 276 S, of the 8th June 1878, to the address of the Adjutant-General. The decision was further communicated by the Government to the

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Secretary of State for India in two separate despatches (No. 211, of 15th July 1878, and No. 256, of 27th July 1879), and in both cases the Secretary of State, upon the advice of the legal adviser of the India Office and with the concurrence of the Secretary of State for War, replied in substance (No. 355, of 5th December 1878, and No. 339, of 20th November 1879) that the word Soldier in the 85th section of the Mutiny Act must be held to include soldiers who are Natives of India. This decision applies to the 149th section (section 156, Army Act, 1881) of the Army Discipline and Regulation Act, which contains the provisions corresponding to the foregoing section.

"But the application of the 149th section of the Army Discipline and Regulation Act to Native soldiers rests upon a yet stronger basis. Section 169 of the Act makes all soldiers of the regular forces subject to the Act, and by section 181, Her Majesty's Indian forces are included among Her Majesty's regular forces; again section 172 (section 180(2), Army Act, 1881) makes special provision for the application of the Act to those officers, soldiers, or followers who may be Natives of India. Every person, therefore, who purchases, receives, or otherwise disposes of the necessaries, clothing equipment, &c., of a Native soldier, is liable upon summary conviction (for which see Army Discipline and Regulation Act, s. 181, page 112) (section 190, pages 163-184, Army Act, 1881) to the penalties set out in the 149th section of the Act as modified by Act VII, 1867, in accordance with the power conveyed by the same section."

A circular in accordance with the above opinion was issued by His Excellency the Commander-in-Chief of India, copy being sent by the Government of India to this Government and by the latter communicated (G.O., dated 8th October 1881, No. 2070, Judicial) to all District and Presidency Magistrates for guidance.

In November 1881, a claim was made in the Madras Presidency Magistrates' Court for enforcement of a maintenance order against a member of the Carnatic Artificer Company—a purely local corps composed of Eurasians, but the members of which are, it seems, attested under the English Army Act.

In that case I expressed an opinion that the provisions of s. 139 of the Army Discipline Act, 1879 (s. 145, Army Act,

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1881) applied, but that I had not been able to ascertain what authority, if any, in this country represents the Secretary of State for the purposes of s. 139, Army Discipline and Regulation Act, 1879; or what procedure should be adopted in India in cases such as are referred to in that section. I therefore requested instruction as to what course should be followed in India by Civil Courts when decrees or orders are passed by such Courts under s. 139 of the Army Discipline and Regulation Act, 1879 (section 145, Army Act, 1881).

My letter to Government was submitted to the Advocate-General who advised Government thus:—"With reference to the order of Government, No. 1858, dated the 17th November 1881, upon the letter of the Chief Presidency Magistrate, Madras, to the Chief Secretary, dated the 14th November 1881, No. 288, I think the course prescribed in s. 139 of the Army Discipline and Regulation Act must be followed when decrees or orders are passed by the Civil Courts in India to which the section applies. The corresponding section in the present Act (44 & 45 Vict., c. 58) is s. 145. A somewhat similar provision was contained in the Mutiny Act, s. 106, but the power given in the Army Discipline and Regulation Act to a Secretary of State to make stoppages was, by the Mutiny Act, given to the Secretary of State for War. I think a copy of the order or decree should still be sent to the Secretary of State for War."

In the present case (*Nathud Bi* v. *Jafar Husain*) the opinion of the Judge Advocate-General of the Army in Bengal was, it appears, communicated by telegraph, and no reasons are stated for the conclusion arrived at by that officer beyond a general allusion to the "tenor" of section 145, Army Act.

The "tenor" of s. 145, Army Act, 1881, is, I respectfully submit, that which I have set forth above. There may be some minor details which would be difficult of application to the circumstances of service in this country, but these difficulties are not confined to the Native soldiery, and they are none of them impossible if the section be used so far as applicable. Even the allusion to a daily rate of pay is mere matter of account, and the conversion of British into local currency is provided for by section 169. Perhaps it may be contended that, if strictly construed, the word

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"Serjeant" does not include the corresponding rank in the Native Army, but it cannot be disputed that the words "any other soldier" include a Native soldier, and even the reference to the rank of serjeant is for purposes of comparison. As regards the Civil Tribunal, s. 190, Army Act, 1881, defines the meaning of "Civil Court" and the "Court of Summary Jurisdiction" as applied to India.

The view I took was, that defendant being undoubtedly a "Soldier of the Regular Forces" within the meaning of the Army Act, 1881, the provisions of that Act are applicable to him, subject only to the modifications specified in s. 180. I could see nothing in the tenor of s. 145, Army Act, 1881, which renders it impossible of application to Native soldiers equally with European soldiers of Her Majesty's Indian forces, and the policy of the law is referable to the whole army without distinction of race.

In the circumstances noted above, I think it better, before passing a final order for the levy of the amount due, by direct action under s. 488 of the Code of Criminal Procedure, which might result in the imprisonment of the soldier, to state the case under s. 432 of the Code of Criminal Procedure for the opinion of the Honorable Judges of the High Court on the question whether or not the provisions of s. 145 of the Army Act, 1881, apply to Natives serving in Her Majesty's Indian forces?

Further proceedings in this matter have been stayed pending the decision of their Lordships on the question now respectfully submitted to them.

The Advocate-General (Hon. *P. O'Sullivan*) and *the Government Pleader* (Mr. *Shephard*) appeared on behalf of Government.

The judgment of the Court (TURNER, C.J., and HUTCHINS, J.) was delivered by

TURNER, C.J.—The 190th section of the Army Act, 1881, prescribes that in that Act, if not inconsistent with the context, the expressions "regular forces" and "Her Majesty's regular forces" shall include Her Majesty's Indian forces subject to the modifications in the Act contained. Those modifications are declared in the 180th section of the Act. There is nothing in that section which prohibits the application to soldiers of Her

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Majesty's Indian forces of section 145.* It remains to be considered whether it is inconsistent with the context to place on the term "regular forces" in section 145 the interpretation prescribed by section 190. It is clear that not only is there nothing in the first clause of the section inconsistent with such an interpretation, but the reason for the provisions of that clause, prohibiting the issue of execution in respect of an order for maintenance against the person, pay, arms, &c., of a soldier, obtains more strongly in this country than in the United Kingdom, inasmuch as there is

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* 44 & 45 Vict., c. 58, s. 145—

(1.) A soldier of the regular forces shall be liable to contribute to the maintenance of his wife and of his children, and also to the maintenance of any bastard child of which he may be proved to be the father, to the same extent as if he were not a soldier; but execution in respect of any such liability or of any order or decree in respect of such maintenance shall not issue against his person, pay, arms, ammunition, equipments, instruments, regimental necessaries or clothing; nor shall he be liable to be punished for the offence of deserting or neglecting to maintain his wife or family, or any member thereof, or of leaving her or them chargeable to any union, parish or place.

(2.) When any order or decree is made under any Act or at common law for payment by a soldier of the regular forces either of the cost of the maintenance of his wife or child, or of any bastard child of whom he is the putative father, or of the cost of any relief given to his wife or child by way of loan, a copy of such order or decree shall be sent to a Secretary of State and in the case—

(a) Of such order or decree being so sent; or

(b) Of it appearing to the satisfaction of a Secretary of State that a soldier of the regular forces has deserted or left in destitute circumstances, without reasonable cause, his wife, or any of his legitimate children under fourteen years of age, the Secretary of State may order a portion not exceeding six pence of the daily pay of a non-commissioned officer who is not below the rank of sergeant, and not exceeding three pence of the daily pay of any other soldier, to be deducted from such daily pay, and to be appropriated, in the first case, in liquidation of the sum adjudged to be paid by such order or decree, and in the second case, towards the maintenance of such wife or children, in such manner as the Secretary of State thinks fit.

(3.) Where a proceeding is instituted against a soldier of the regular forces under any Act, or at common law, for the purpose of enforcing against him any such liability as above in this section mentioned, and such soldier is quartered out of the jurisdiction of the Court, or, if the proceeding is before a Court of Summary Jurisdiction, out of the petty sessional division in which the proceeding is instituted, the process shall be served on the Commanding Officer of such soldier, and such service shall not be valid unless there be left therewith in the hands of the Commanding Officer a sum of money (to be adjudged as costs incurred in obtaining the order or decree, if made against the soldier) sufficient to enable him to attend the hearing of the case and return to his quarters, and such sum may be expended by the Commanding Officer for that purpose; and no process whatever under any Act or at common law in any proceeding in this section mentioned shall be valid against a soldier of the regular forces, if served after such soldier is under orders for service beyond sea.

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greater probability that the services of the soldier may be required on active duty.

If, as we think cannot be questioned, the provisions of clause 1 of the section are not inconsistent with the prescribed interpretation, clause 2, so far as regards the Court making the order, is imperative—and there is nothing obviously inconsistent with the interpretation in that part of the clause; indeed it may be argued that the term "a Secretary of State" was used so as to include the Secretary of State for India, to whom a Court of British India would directly report. The provisions of this clause, conferring a discretionary power on the Secretary of State, are also not inconsistent with the interpretation prescribed; the term "daily pay" might be interpreted to mean the quota of the monthly pay due for each day, and the term "Serjeant" as implying in the case of Her Majesty's forces in India the corresponding rank; but it would clearly be most inconvenient that a reference in every case in which an order is passed against a sepoy be made to the Secretary of State in England, and it is more probable that, had there been an intention that the section should apply to a soldier of the Indian forces, some authority in British India would have been substituted.

In the third clause there are expressions, which are inconsistent with the prescribed interpretation of the term 'regular forces.' Although the Court of the Presidency Magistrate is a Court of Summary Jurisdiction within the meaning of the Act, section 190, it is not situated in any "Petty Sessional Division." The final provision declaring any process mentioned in the section invalid, if served after the soldier is under orders for service beyond the seas, *i.e.*, out of the United Kingdom, the Channel Islands and the Isle of Man, is inconsistent with the interpretation of the term "regular forces" as including Her Majesty's Indian forces, who are enlisted in places beyond the seas and ordinarily serve there.

Looking to the context, we hold that the section as a whole does not apply to soldiers of Her Majesty's Indian forces, and the Chief Magistrate will be informed accordingly.

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22 Bom. 175
13 C.W.N. 737
10 C.L.J. 33.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885.
March 5, 9.

MÍNAKSHI (PLAINTIFF), APPELLANT,

and

VÉLU AND ANOTHER (DEFENDANTS, NOS. 1 AND 2), RESPONDENTS.*

Civil Procedure Code, ss. 59, 63, 138, 139—*Appeal—Rejection of documents admitted by Lower Court.*

Certain documents having been allowed by the District Múnsif to be filed by the plaintiff during the trial of a suit, the District Judge, on appeal, held that he was bound to strike them off the file on the ground that they were not filed with the plaint nor entered in any list annexed to the plaint, and because the Múnsif had not recorded any reason for admitting them:

Held, that, as the documents had been admitted in evidence by the Lower Court, the Appellate Court was bound to consider them.

THIS was an appeal from the decree of J. H. Nelson, District Judge of Chingleput, reversing the decree of T. Chellappa Náyakar, District Múnsif of Punamalai, in suit 529 of 1883.

The plaintiff Mínakshi sued the defendants, Vélu Pillai and two others, to recover Rs. 1,380-7-3, balance due on a promissory note executed by Annasámi, deceased father of defendants, Nos. 1 and 2, and elder brother of defendant No. 3.

The Múnsif decreed for plaintiff.

The defendants appealed, *inter alia*, on the ground that the Múnsif had improperly admitted certain documents in evidence in support of plaintiff's claim.

The District Judge reversed the decree of the Múnsif, remarking in his judgment—

"Exhibits C to J and L to N were improperly received by the Lower Court. No list of documents was put in with the plaint, though apparently there was nothing to prevent the plaintiff from obeying the law; and no reason for the Lower Court overlooking

* Second Appeal 862 of 1884.

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MINAKSHI v. VELU.

this omission appears on the record. I am bound to strike all these documents of the record."

The plaintiff appealed to the High Court.

Bháshyam Ayyangár and *Kaliána Ráma Ayyar* for appellant.

Mr. *Tarrant*, *Gurumurti Ayyar* and *Sadásiva Ayyar* for respondents.

The facts necessary for the purpose of this report appear from the judgment of the Court (Muttusámi Ayyar and Hutchins, JJ).

JUDGMENT:—This suit was brought by the appellant on the documents A and B which were duly filed with the plaint. At the hearing the appellant's fourth witness produced on summons exhibits C to G, her fifth witness H and J, and her sixth witness K to N.

The whole of these exhibits C to N, with the single exception of K, have been "struck off the record," by the District Judge, as not having been entered in any list attached to the plaint and on the ground that the Múnsif had recorded no reason for allowing their admission. Now the majority of these exhibits, including K, were simply put in evidence for the comparison of Annasámi's signature thereto, with his alleged writing in A and B. C, however, is stated to contain an admission of the debt by the deceased Annasámi, while D and E contain a similar admission by the respondent No. 1 and F, which the respondent No. 1 admits, has been filed to support D and E, by comparison of the handwriting.

The District Judge has not stated under what section of the Code he considered that these exhibits could be absolutely ignored. Section 59 certainly does require a plaintiff to file with his plaint a list of all the documents on which he *relies*, *i.e.*, which he is then in a position to know to be essential to his case, whether in his possession or power or not; but this cannot apply to documents tendered merely for comparison of handwriting. Section 63 states the penalty for omitting to file such a list. No document which ought to have been entered in such a list shall be received in evidence at the hearing without the leave of the Court. With regard to that it is enough to say that the Múnsif did allow the documents to be filed. Either there was an objection raised which was overruled, or they were not objected to: and in either case we do not think it open to the Appellate Court to refuse to consider

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their value. *Goshain Tota Ram* v. *Raja Rickmunee Bullub*,(1) *Hanooman Singh* v. *Fell*.(2) MÍNAKSHI v. VÉLU.

Reference has been made to ss. 138 and 139, but with regard to these it is sufficient to say, first, that it is very doubtful whether any of these documents can be said to have been in the possession or power of the plaintiff herself, and, secondly, that there is nothing to show that the plaintiff was called upon to produce her documents at the first hearing. It is only documents which ought to have been produced at the first hearing that can be absolutely excluded under s. 139 and documents need not be produced at the first hearing unless "called for by the Court."

We consider that the District Judge is bound to consider the documentary evidence and to give it such weight as it deserves. With regard to K, it has been pointed out that the witness who produced it did so under a summons, but it is not likely that this will materially affect the view which the Judge has taken of it.

We refer to the Judge, on the whole evidence, the issue, Whether the documents sued on are genuine, and, if so, what is the amount due to the plaintiff? With regard to the ninth ground of appeal and C.M.P. 687 of 1884, the application for the admission of the documents should be made to the District Judge. We will only say that, if the allegations made in the ground of appeal are correct, the documents ought to be admitted.

The District Judge is requested to submit his finding on the above issues to this Court within six weeks from the date of receiving this order when 10 days will be allowed for filing objections.

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(1) 13 M.I.A., 77. (2) N.W.P., 1868, p. 148.

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APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Brandt.

1885.
February 20.
March 9.

11 Mad. 315.

UMAMAHÉSWARA (PLAINTIFF), APPELLANT

and

SINGAPERUMÁL AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindú law—Money decree against father—Attachment of sons' shares.

In a suit brought against the father of a Hindú family and his eldest son, on a bond executed by the former, by which family property was hypothecated as security for the repayment of the debt, decree was passed against the father only and his share of the property was declared liable to be sold. In execution of this decree, family property was attached, but, on the intervention of the younger sons, the attachment was set aside as to their shares. In a suit brought by the decree-holder to establish his right to sell the younger sons' shares in satisfaction of the decree against their father:

Held, that so far as the younger sons were concerned the decree must be treated as a decree for money against the father and that all that could be sold in execution of the decree against the father was the share of the father.

THIS was an appeal from the decree of G. D. Irvine, Acting District Judge of Trichinopoly, dated 17th July 1884, confirming the decree of T. M. Rangácháryár, District Múnsif of Aryalúr, in suit 29 of 1882.

The plaintiff, Umamahéswara Ayyan, brought suit No. 595 of 1880 against the father of the three minor defendants in this suit and their elder brother to recover Rs. 792-2-0, due under a bond, hypothecating certain land as security for the debt, dated 5th April 1875, executed by the father in satisfaction of a decree obtained against him in 1871, which decree was obtained on a bond of 1868 for money borrowed, it was alleged, for family purposes by the father.

The plaintiff obtained a decree against the father only, and his share in the family property was declared by the decree to be liable to be sold in default of payment.

In execution of this decree, plaintiff attached certain family property, upon which the present defendants, by their next friend,

* Second Appeal 796 of 1884.

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UMAMAHÉSWARA v. SINGAPERUMÁL.

intervened, claiming that their shares in this property were not liable to be sold and on the 16th September 1881 their claim was allowed.

This suit was accordingly brought to establish the liability of the defendants' shares in the property attached to be sold in satisfaction of the decree obtained by the plaintiff against their father.

It was alleged in the plaint that the defendants were not born in 1868 when the original bond was executed by their father, and therefore, their right to object to the sale of the property hypothecated was denied.

The defendants pleaded, *inter alia*, that, as plaintiff had failed in suit 595 of 1880, to prove that the debt was binding on the family (this issue having been raised), he was debarred by ss. 13 and 43 of the Code of Civil Procedure from bringing this suit.

The District Múnsif overruled these pleas, but held that, under the decree in suit 595 of 1880, the defendants' shares could not be sold, and, therefore, he declined to admit evidence tendered to show that the judgment-debt in that suit was binding on the defendants—*Chockalinga* v. *Subbaraya*.(1)

On appeal, the District Judge referred to *Rámákrishna* v. *Namasivaya*,(2) overruling the case cited by the Múnsif, but confirmed the decree on the ground that the plaintiff was really bringing a fresh suit on the same cause of action against other members of the family, whom he ought to have included in the former suit.

The plaintiff appealed to the High Court.

Mr. *Shephard* and *Rámáchandra Ráu Saheb* for appellant.

Báláji Ráu for respondents.

The Court (Hutchins and Brandt, JJ.) delivered the following

JUDGMENT.—The judgment of the District Court cannot be supported on the ground on which it has been put. The appellant having obtained a hypothecation-bond from a Hindú father, sued the debtor and the debtor's eldest son and obtained a decree against the father and the father's share in the property, the eldest son's share being exonerated on the ground that appellant had failed to prove that the debt was a family debt. But the fact of the eldest son having been sued cannot affect the creditor's position as against the younger sons. So far as they, the present

(1) I.L.R., 5 Mad., 133. (2) I.L.R., 7 Mad., 295.

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UMAMAHÉSWARA v. SINGAPERUMÁL.

respondents, are concerned, the appellant holds a money-decree against their father with an express charge on a certain share of the property, which does not include respondents' shares. We agree with the appellant's counsel that the creditor cannot be put in a worse position by the fact of his judgment-debt being expressly charged on the father's share. As between him and the respondents he is the holder of a money-decree against their father—neither more, nor less. Section 43 of the Code applies only where part of a claim has been relinquished, not where the plaintiff has omitted to join some of those liable for his claim. When a plaintiff omits to join some of those liable, he is estopped from bringing a fresh suit, not by s. 43, but by the doctrine of *King* v. *Hoare*(1) that no man may bring two suits on the same obligation. But it has been held by a Full Bench in the case mentioned by the District Judge, *Rámákrishna* v. *Namasivaya*(2), that this principle does not apply where the second suit is brought, not on the original obligation, but simply for the purpose of establishing that the interests of the sons in the joint family property may be sold under the decree against the father.

The question, however, arises, and it is this which induced us to reserve judgment in the case, whether under any circumstances the effect of a mere money-decree against a father can be extended so as to bind the sons' interests. This point was not considered in *Rámákrishna* v. *Namasivaya*(2). The statement of the facts seems to indicate that the judgment-debt was charged on the property, and we have inspected the original decree and find that it was so charged. And in *Sitanath Koer* v. *Land Mortgage Bank of India*(3) also there was a mortgage-decree. It is now settled law that a decree against a Hindú father and the family property in his hands binds the property, and that the whole property can be sold under such decree, subject to the right of the sons in certain cases to come in and show that the debt was incurred for an immoral or illegal purpose. Where, therefore, the sons come in before the sale and claim the exemption of their shares, a question between them and the decree-holder is properly raised in execution, and the party against whom the order is made is entitled, under s. 283, to institute a suit to establish the right which he claims, which in the case of the decree-holder is the right to bring the whole

(1) 13 M. & W., 494. (2) I.L.R., 7 Mad., 295. (3) I.L.R., 9 Cal., 888.

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property to sale. But where the decree is a simple money-decree against the father, all that can be sold is the father's interest and the right to have such interest ascertained and partitioned off—*Hardi Narain Sahu* v. *Ruder Perkash Misser*(1). Where the decree-holder attaches more than the father's interest, the sons have a right to come in and object in the same way as any stranger interested in the property, but neither the fact of their claim being allowed nor the circumstance that the judgment-debtor happens to be a Hindú father can in any way give the decree-holder a right to extend the operation of the decree or proceed against more than his debtor's right, title and interest.

Upon this ground, the appellant's suit fails and his second appeal must be dismissed with costs.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

1885. January 19.

RÁMÁSÁMI

against

KANDASÁMI.*

Act XIII of 1859—*Contract to supply labourers.*

A contract, in consideration of an advance of money, to supply labourers to do certain work on an estate, falls within the scope of Act XIII of 1859, and the fact that such contract contains covenants to pay penalties in default of supplying the labourers, and to repay the advance, if necessary, by personal labour for five years, does not take the contract out of the operation of the Act, so as to make illegal an order, directing the contractor to be imprisoned for failure to comply with an order to repay the advance.

THIS was a reference to the High Court, under s. 438 of the Code of Criminal Procedure, by C. Kough, Acting Joint Magistrate in charge of the Office of the District Magistrate of Madura.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (Turner, C. J., and Brandt, J.).

Counsel were not instructed.

JUDGMENT.—The accused received an advance of Rs. 54 and agreed to collect within one week 20 coolies and within another

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(1) I.L.R., 10 Cal., 626.

* Criminal Revision Case 19 of 1885.

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RÁMÁSÁMI v. KANDASÁMI.

week 15 more coolies, to take them to the complainant's coffee-estate, to get work done by them on the estate for one month, and to get their accounts settled so as to leave no arrear outstanding against him. He further agreed to pay a penalty of Rs. 1 and 2 per diem in case of delay on his part in supplying the two sets of labourers, respectively. He also engaged, in case he failed to fulfil the contract, to make compensation for any loss which the complainant may sustain, to undergo the punishment prescribed by Act XIII of 1859, and that, in repayment of the said advance, he would himself repair to the coffee-estate and work on it as a cooly for five years, and that at the end of the fifth year he would get his accounts settled and take back the agreement. The accused failed to supply coolies according to this contract, and, on the 14th August 1883, the Sheristadár Magistrate of Dindigul found that the contract was broken and directed the accused, under Act XIII of 1859, to repay the advance of Rs. 54 within fifteen days from that date as offered by the accused and agreed to by the complainant. The accused having failed to comply with this order, the Sheristadár Magistrate sentenced him to undergo rigorous imprisonment for one month. The Joint Magistrate in charge of the District Magistrate's Office observes that the advance was made to the accused for the purpose of collecting coolies to work on a coffee-estate, that the penalty prescribed being personal service, the case does not fall within the scope of Act XIII of 1859, that the order for the repayment of the advance was one which it was not competent for the Sheristadár Magistrate to pass, and that the sentence of rigorous imprisonment must be set aside as illegal.

The accused agreed to collect coolies and to get work done by them on the coffee-estate for one month and the agreement is within the scope of Act XIII of 1859. How far the agreement to pay a penalty for every day's delay in supplying labourers and to serve as a cooly for five years, in the event of the contract not being fulfilled, is valid, it is not necessary to decide for the purpose of this reference, but it would suffice to observe that even if it is valid, the complainant is still entitled to claim the performance of the substantive agreement if still capable of performance, or the repayment of the advance.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

KANNA PISHÁRODI (DEFENDANT No. 1), APPELLANT,

and

KOMBI ACHEN AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1885. January 14. April 1.

9 Mad. 415. 11 Bom. 6. 17 Mad. 273. 25 Do. 569. 28 Mad. 193.

Malabar law—Karnavan—Powers restricted by family arrangement—Redemption of kánam—Repayment of renewal fee, improperly re-received by karnavan—Amount to be ascertained before decree—Value of improvements to be ascertained before decree—Jenmi—Right to deduct arrears of rent due from sum payable.

The ordinary powers of the karnavan of a Malabar tarwad can be restricted by a family agreement to which he is a party, and if in breach of such agreement, the karnavan makes an alienation to a stranger who has notice of the agreement, the tarwad is not bound by the alienation.

When a decree is passed for recovery of land demised on kánam on payment of the amount received as renewal fee, the amount must be ascertained at the trial and inserted in the decree.

On taking an account between the jenmi (mortgagor) and kánam-holder (mortgagee), the former, on redemption, has by custom a right to deduct all arrears of rent due to him from the sum which he has to pay to the latter before recovering possession of the land.

THIS was an appeal from the decree of F. H. Wilkinson, District Judge of South Malabar, reversing the decree of B. Kamaran Náyar, District Múnsif of Temelprom, in suit 538 of 1882.

The facts, so far as they are necessary for the purpose of this report, appear from the judgment of the Court (Turner, C. J., and Brandt, J.).

Gopálan Náyar for appellant.

Sankaran Náyar for respondents.

JUDGMENT.—The respondents brought this suit to recover two items of property, which, they alleged, had been demised on kánam by their ancestor to defendant No. 1 in 1034 (1858).

So far as is necessary to consider the pleas for the purposes of this appeal, the defendants pleaded that the demise of 1034 was renewed by the karnavan, Pangi Achen, in 1053 (1878), that rent

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* Second Appeal 9 of 1884.

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KANNA PISHÁRODI v. KOMBI ACHEN.

had been duly paid, and that, if they were ousted, they were entitled to the value of improvements.

The Judge has found that defendant No. 1, the kánam-holder, was aware that the karnavan, Pangi Achen, had no right to grant a renewal by reason of an agreement made by the family restricting his powers. He, therefore, set aside the renewal and decreed the return of the property. But he directed that the amount received for the renewal fee should be ascertained in execution of decree and should be repaid by the respondents. He also held that the rent which was in arrear should be deducted from the kánam-amount, but he omitted to decide whether the holder of the kánam or persons in possession were entitled to any sum for improvements.

In second appeal, it is contended that a karnavan is competent to grant a renewal of a kánam and that the District Court erred in holding that a renewed kánam was not valid; that having paid the renewal fee the kánam-holder is entitled to the further term of twelve years; that the claim to set aside the renewed kánam is barred by limitation; that no more than three years' rent can be set off against the kánam-amount; and that the value of improvements should have been awarded.

Ordinarily, it is of course true that the karnavan of a Malabar tarwad is entitled to grant a renewal of a kánam, but it is in the power of the family, with the assent of the karnavan, to place a restriction on his ordinary powers, and in this case it is found by the Judge that the family had done so and that the fact was known to the kánam-holder; consequently, although the kánam-holder had paid the renewal fee, the tarwad is entitled to contend that the renewal was improperly granted, and on returning the renewal fee, it may claim to recover possession of the property, inasmuch as the original kánam has expired.

The District Court should not have postponed the inquiry as to the amount paid for renewal to the execution of the decree. It should have ascertained what was the sum which was paid, and in its decree should have directed the restoration of the property conditionally on the repayment of that sum. It was also the duty of the Court to have ascertained whether the kánam-holder was entitled to any sum for improvements, and if so, what was the sum to which he was so entitled.

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With regard to the claim to set off arrears of rent for more than three years against the kánam-amount, we observe that, in the Sadr Court's proceedings of 5th August 1856, this right was distinctly recognized. Those proceedings are in accordance with the customary law recorded in "Vyavahára Samudram," a work to which an antiquity of over two hundred years is attributed.

It is no doubt true that, where a "set-off" is pleaded, only so much of it can be allowed as falls within the period of limitation, if the set-off consist of a debt resulting from an independent transaction. But the claim that a deduction should be made from the kánam-amount on account of arrears of rent is not properly described as a "set-off."

By the custom of the country the kánam-amount is looked upon as a security for the rent; and on the expiry of the term, an account is taken between the jenmi and the kánam-holder, and while there is allowed to the kánam-holder interest on the sum paid by him as kánam and the value of improvements, there is allowed to the jenmi whatever rent may be in arrear, with interest on the arrears. In taking this account, allowance is made to the landlord of all the rent in arrear, and not only of so much as could have been recovered by the jenmi if he had brought a suit for the rent.

This is in accordance with the general law that, where parties reserve the settlement of the items of cross and connected accounts to a particular period, the several items will then be admitted or disallowed independently of any question, whether suit could be brought to recover them separately. The jenmi has the right either to sue for the rent as it accrues due, or to claim the enforcement of the security afforded by the kánam-amount when the account between the parties is adjusted.

We must set aside the decree and direct the Judge to ascertain what is the amount of the renewal fee, if any, that was paid and what is the value of improvements to which the kánamdár is entitled, if any, in respect of improvements.

Having tried these issues, we direct him to pass a fresh decree. The costs of this appeal will abide and follow the result.

NOTE.—See I.L.R., 7 Mad., 545.

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APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Brandt.

1885. March 13, 14.

KRISHNAN (PLAINTIFF), PETITIONER,

and

REVI VARMA (DEFENDANT), RESPONDENT.*

Court Fees Act, s. 7, cls. ii, iv—Claim for future emoluments attached to an office—Jurisdiction—Valuation—Madras Civil Courts Act, 1873, s. 12—Portion of claim struck out and plaint returned for presentation to inferior Court.

In a suit filed in the Court of a Subordinate Judge, the plaintiff prayed, *inter alia*, for a decree for the payment, annually, of the emoluments attached to a certain office, or their value at a rate stated in the plaint. This portion of the claim he valued, under cl. ii of s. 7 of the Court Fees Act, at ten times the amount of the value claimed for one year. The value of the claim thus stated exceeded the pecuniary limit of the jurisdiction of the District Múnsif. The Subordinate Judge held that this portion of the claim was not actionable, inasmuch as the right to the emoluments was conditional upon services to be rendered, and did not fall under cl. ii of s. 7 of the Court Fees Act, not being a fixed sum payable periodically, and therefore he held that the plaint was improperly valued, that the suit was not within his jurisdiction, and that the plaint should be returned to be presented to the proper Court:

Held, that this order was right.

IN suit No. 43 of 1882 in the Court of the Subordinate Judge of North Malabar, Thekkampaten Puthen Vittil Krishnan sued Revi Varma Valia Rájá of Cherakal Kovilagom for a decree, (1) declaring that the plaintiff's tarwad possessed the hereditary right to an office and other rights in a certain temple, of which the defendant was the manager; (2) declaring that certain emoluments were annually due to plaintiff's tarwad and should be paid in future; (3) directing payment of the value of emoluments already due to plaintiff but withheld by the defendant; and (4) perpetually restraining defendant from obstructing the plaintiff in the performance of the duties of his office.

* Civil Revision Petition 412 of 1884.

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The suit was valued as follows :—

	RS.	A.	P.
Ten times Rs. 214-13-11, emoluments due for a year	2,148	11	2
Arrears of emoluments	437	1	1
Interest on arrears	33	4	5
Total ..	2,619	0	8

Court Fee stamps for Rs. 160 were affixed to the plaint and subsequently an additional stamp of Rs. 10 was added for the injunction, and the plaint was declared to be properly stamped by the Subordinate Judge (V. P. deRozario) on the 16th December 1882. On the 22nd of January 1884, the case was tried by C. Rámáchandra Ayyar, who delivered the following judgment :—

"The plaintiff, calling himself Karayma Kalagom and hereditary Karyam Parayunnavar, sues to have declared as against the defendant his right to both the offices and to the future emoluments throughout the existence of his tarwad, and also to recover arrears of wages or emoluments for twenty-nine months from 30th Minam 1055 (10th April 1880) and for a perpetual injunction restraining the defendant from interfering with the performance of the duties.

"Both the offices claimed are alleged to yield an annual income of Rs. 214-13-11, and the 123 items of income consist of boiled-rice, oil, raw-rice, sugar, burnt sticks, and milk-conjee, said to be annually given to the plaintiff's tarwad for services rendered: no fixed money allowance appertains to the office, and the value of the 123 items is not fixed. However it may be, the emoluments claimed are purely wages to be earned by rendering services which may be dispensed with by person having authority for proved misconduct. The yearly income, therefore, can be called neither maintenance nor annuity within the meaning of cl. ii, s. 7, of the Court Fees Act. Maintenance, annuity, and other sums payable periodically should be fixed, and this is distinguishable from arrears of maintenance for which cl. i specially provides. Under this clause, suit for arrears of sums periodically payable is valued according to the amount claimed.

"The plaintiff, seeking for a declaration of his right to both the offices and for recovery of twenty-nine months' arrears of his emoluments, had to value his suit under cl. iv; for he prays for a declaratory decree with consequential relief, which is the recovery

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KRISHNAN v. REVI VARMA.

of the arrears of wages. The arrears of emoluments claimed were Rs. 470-5-6, and this was the value of the suit. But the plaintiff asks for a declaration entitling him to payment of future wages, or emoluments, as he calls it, throughout the existence of his tarwad. This becomes due to him only when the service for which it may be due is performed. I do not see any legal cause of action for this claim. The claim has been made apparently to evade the District Múnsif's jurisdiction over the suit. It is true that a plaintiff might ask for several reliefs in one suit, but the Court has power to strike out any one relief for which it may appear that no cause of action had accrued on the date of the plaint. In my opinion, the plaintiff had no cause of action to sue for his future wages or emoluments for an indefinite period, and this prayer the Court is not bound to allow. The valuation set upon this right was Rs. 2,148-11-2. This being struck off the plaint, the value of the other reliefs asked for is Rs. 470-5-6 and the suit is cognizable by the District Múnsif. Directing the defendant to continue payment to the plaintiff's tarwad of future wages for an indefinite period would imply a direction of the Court to the plaintiff to continue performance of his duties for an indefinite period, and this would be absurd. If the plaintiff refuse to perform his duty, the defendant might engage another. It is argued that even if the plaintiff was entitled to claim future wages, valuing one year's wages at ten times, the value for the purpose of jurisdiction is one year's wages only; for the subject-matter of the suit is one year's wages only. There is much force in this argument, and the plaintiff's vakíl does not show me any precedent to the contrary. This view of the question also reduces the valuation within the pecuniary jurisdiction of a District Múnsif.

"I am of opinion that the suit has been improperly valued and so the Court is not bound to try the suit when the proper value is within the District Múnsif's jurisdiction. I find that the value of the suit is Rs. 684, and direct that the plaint be returned to the plaintiff to be presented to the proper Court. The plaintiff will bear all costs."

Against this order the plaintiff appealed to the District Court.

The District Judge, T. vonD. Hardinge, confirmed the order of the lower Court. The plaintiff then presented a petition to the

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High Court under s. 622 of the Code of Civil Procedure, praying that the lower Court's order might be set aside on the ground *inter alia*, that the Subordinate Judge had jurisdiction to try the suit and that it was properly valued in the plaint.

Anantan Náyar for petitioner.

Sankaran Náyar for respondent.

The Court (Hutchins and Brandt, JJ.) delivered the following judgments:—

HUTCHINS, J.—The plaintiff asked for arrears and for a declaration of right with a direction that the defendant should pay certain emoluments annually in future. The Subordinate Judge held that the prayer for a direction for future payments must be struck out, as no cause of action for them had accrued and as they were not of so fixed and definite a character as to come within the term "sums payable periodically" in cl. ii, s. 7, of the Court Fees Act.

It is admitted that, if this prayer is excluded, the suit falls within a Múnsif's jurisdiction and the plaint was properly returned.

It seems to me that the Judge's order was right, and for the reason on which he has chiefly relied, viz., that it would be impossible to order the defendant to make future payments which would only become payable upon the plaintiff performing certain acts which he might never perform.

This application must accordingly be dismissed with costs.

BRANDT, J.—I agree that the petition must be dismissed. The question of jurisdiction does no doubt arise, but if the Subordinate Judge has correctly interpreted the law he had no jurisdiction, and I have some doubt whether we should go back to determine whether or not the Subordinate Judge has correctly decided the point of law raised. If we are to determine this, I have no doubt the conclusion arrived at is right.

The subject-matter of the suit was in reality a claim to the money value of certain emoluments due for past services and for a declaration that the plaintiff has a right or lies under an obligation to perform such services.

The subject-matter of this suit does not require a Court Fee stamp payable in respect of a suit beyond the pecuniary jurisdiction of a District Múnsif, unless a sum equal to ten times the

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KRISHNAN v. REVI VARMA.

yearly emoluments claimed be taken into calculation, and I am clearly of opinion that it is not open to a plaintiff to represent the subject-value of the suit as more than it really is with a view to having his suit filed in a superior Court, and that if this is done by mistake the suit must nevertheless be remitted to the lowest Court of competent jurisdiction.

The words "or other sums payable periodically" in cl. ii of s. 7 of the Court Fees Act do not apply to the case of boiled-rice, oil, ghee, &c., to which it is the plaintiff's case that he will be entitled on performance of certain services to be rendered, which services, by reason of the death or of the dismissal of the plaintiff for proved misconduct, he may never perform.

The relief that is nominally sought in respect of the declaration asked for is not and cannot be treated as consequential relief.

For the reason stated at the conclusion of the judgment of my learned colleague, a decree for such consequential relief could not be made, and the Subordinate Judge was right in holding that the prayer for a direction for future payment should be struck out or treated as mere surplusage.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

1884. October 13. 1885. March 24.

24 Mad. 315
34 All. 572

KRISHNAMA (PLAINTIFF), APPELLANT,

and

PERUMÁL AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindú law—Mortgage by father, Suit to enforce against manager of family—Decree for sale—Attachment—Order for sale of property—Sale of right, title, and interest—Rights of purchaser.

V, a Hindú, and his son P executed a mortgage of a house, the self-acquired property of V. V having died, P, the manager of the family, was sued by the mortgagee on his own promise in the mortgage-deed and as representative of V, and a decree was passed for the sale of the house in default of payment by P within three months of the debt then due.

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* Appeal 12 of 1884.

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This period having elapsed, the mortgagee applied to the Court to enforce the decree by attachment of the mortgaged property, and the property having been attached, application was made for sale.

By a warrant, dated 3rd December 1874, the Sheriff of Madras was ordered to sell the property, and on the 12th July 1875 the Sheriff sold the right, title, and interest of the judgment-debtor in the said house to K.

In a suit brought by K against P and the other members of the family to recover possession of the house:

Held, that as the mortgagee intended to enforce his rights under the mortgage by sale, and the Court intended to sell the house as mortgaged property, K was entitled by virtue of his purchase to recover possession of the house—*Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (6 I.A., 238) referred to and followed.

THIS was an appeal from the decree of Hutchins, J., in civil suit No. 92 of 1883 on the file of the Original Side of the High Court.

The plaintiff, Anjemédu Krishnama Chetti, sued to recover possession of a house, the family property of defendants 1—4, tenanted by defendants 5—7.

In 1868, Runkala Vírasámi Reddi, deceased father of defendants 1—3 and husband of defendant No. 4, and defendant No. 1, Runkala Perumál Reddi, mortgaged this house.

In civil suit 479 of 1874, the mortgagees obtained a decree for the sale of the house in default of payment of the debt then due on the mortgage, and on the 2nd April 1875 the plaintiff purchased the house at public auction and obtained a certificate of sale on the 12th July 1875.

On the 10th August 1882, the plaintiff demanded possession, but the defendants refused to quit—hence this suit.

On the 28th April 1884, the following judgment was delivered by

HUTCHINS, J.:—The plaintiff claims to eject the defendants from their family house as purchaser of the same at an auction held by the Sheriff under this Court's decree in civil suit No. 479 of 1874.

That suit was brought against the defendant No. 1 upon a mortgage, which had been executed in 1868 by his deceased father and himself. The defendants Nos. 2 and 3 are undivided half-brothers of defendant No. 1 and appear by him as their guardian *ad litem*. They and their mother, defendant No. 4, have also been present in person. The other defendants are merely tenants lodging in the house and have not put in an appearance.

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KRISHNAMA v. PERUMÁL.

The plaint avers, among other things, that the house at the time of the mortgage belonged to Vírasámi, the father of defendants 1, 2, and 3, and that, up to the date of the present suit, these defendants were living together in the same house as members of a joint Hindú family. No written statement was put in, but it may be inferred from the issues that these averments were not traversed. In 1876 the plaintiff applied for delivery of possession of the premises, but he says he was referred to a regular suit. The plaint avers that he gave a formal notice to quit on 10th August 1882, and prays for an account of rents from 2nd April 1875, the date of the auction.

The issues framed are as follows :—

I. Can a decree on a mortgage obtained against one member bind the family?

II. Was the loan taken for the purposes of the family?

III. Was the first defendant sued as managing member?

IV. To what relief, if any, is plaintiff entitled?

The plaint (A) and decree (D) in civil suit 479 of 1874 show that the first defendant was sued individually and not as manager of the family. He is described in the former as the son and only legal representative of Vírasámi.

It seems hardly necessary to go into the second issue, because I find that the Sheriff proposed to sell and the plaintiff has purchased the right, title, and interest of the defendant only, *i.e.*, of the present first defendant. The certificate of sale and the order of confirmation (C) are explicit upon this point, and the sale was held under the old Procedure Code.

If it were necessary, I should be inclined to find that the mortgage was binding on the family. It was executed by Vírasámi who had certainly acquired the house in 1855 (B), as well as by his eldest and only adult son. The defendants' suggestion that it was bought with their grandmother's money is evidently untrue. The mortgage purports to have been for one necessity and recites the fact that the family had only been living in the house ten or fifteen years, thus supporting the plaintiff's evidence that Vírasámi had built it soon after his purchase in 1855. Probably, as alleged, with funds advanced to him by his master, except as to the fact that his master was in difficulties about the time of the mortgage, the defendants' evidence is worthless, and that fact goes to support

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plaintiff's case showing that the master was compelled to realize as many of his outstanding debts as possible. KRISHNAMA v. PERUMÁL.

Having purchased the right, title, and interest of the defendant No. 1 only, the plaintiff is obviously not entitled to eject. He is entitled to the share of defendant No. 1 upon a partition, but this is not a suit for partition.

The suit is dismissed. The only costs incurred by defendants are costs which I cannot allow.

The plaintiff appealed.

Mr. *Branson* for appellant.

Respondents were not represented.

The judgment of the Court (Turner, C.J., and Brandt, J.) was delivered by

TURNER, C.J.—The evidence sufficiently establishes that the site, on which the house in suit was erected, was purchased by Vírasámi Reddi, who was then in the service of Anga Chetti's son, Somu Chetti, and that he erected the house thereon. The evidence of the first witness that the funds were supplied by Somu Chetti to Vírasámi is corroborated by the fact, proved by Perumái Reddi, that, when Somu Chetti had need of money, Vírasámi and Perumál mortgaged the house and supplied him with Rs. 500, which was probably in repayment of the debt due to him for the loan.

The mortgagees brought suit against Perumál Reddi, and in their plaint stated that he was the son and only legal representative of his father, but he was also sued on his own agreement in the mortgage-deed; and on 4th August 1874, a decree was passed against him personally, as well as a sale ordered of the mortgaged property if default was made in payment of the debt and costs of suit for three months from the date of the decree.

On the 5th November 1874 the decree-holders applied to enforce the decree against the then defendant, Perumál Reddi, by attachment of his immovable property as specified, and the specification described the mortgaged house and ground. On the 6th November, a warrant was issued which recited so much of the decree as decreed the recovery of the debt and costs from the defendant, and that application had been made for the attachment of the immovable property of the judgment-debtor specified as the house and ground mortgaged.

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KRISHNAMA v. PERUMÁL.

On the 1st December application was made for sale of the attached property.

By a warrant, dated the 3rd December 1874, addressed to the Sheriff and which recited that an order had been issued for the attachment of the immovable property thereunder specified, viz., the house and ground mortgaged, the Court commanded the Sheriff to sell the said property or so much thereof as might be necessary to satisfy the amount due under the decree. On the 22nd February 1875, the Sheriff of Madras issued a proclamation, which recited that he had been ordered to sell the immovable property thereunder specified, viz., the house and ground, and declared that he would proceed to sell the right, title, and interest of the then defendant in the said property on a day named.

On the 12th July 1875, by an order of the Court reciting that the Sheriff had made a return that he had, on the 2nd April, in obedience to the warrant of the Court, sold to Anjemédu Krishnama Chetti the right, title, and interest of the then defendant in and to the house and ground mortgaged, the sale was confirmed, and on the same day a sale certificate was issued to the purchaser, which certified the purchase of the right, title, and interest of the then defendant in the house and ground.

There is evidence, which we accept as reliable, that the defendant Perumál Reddi, the only adult male member of the family, was the manager of the family after his father's death.

The Procedure Codes of 1859 and 1877 containing no directions as to the course to be followed for executing a decree ordering a sale for the satisfaction of a mortgage-debt, it was for some time usual to proceed under the Code by attachment, and it was not until long after the date of the sale now in question that the Court ruled that where a sale is ordered by the decree attachment is not necessary. The circumstance that an attachment was issued will not necessarily show that the decree-holder desired to execute the decree as a mere money decree. Looking to the circumstances that the decree-holder had asked for relief against Perumál Reddi not only as himself liable under the mortgage but as the representative of his father, that he had prayed for, and obtained an, order for the sale of the mortgaged property, and that immediately on the expiry of the time limited for redemption he had taken proceedings to carry out the order, we have no doubt the application

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for sale was made for the purpose of enforcing the mortgage. The warrant of the Court directed the sale of the property. The Sheriff's proclamation and return and the sale certificate cannot limit the order; the auction-purchaser was bound to look to the warrant for sale and the decree, and is entitled to whatever rights in the property the Court intended to sell. We have no doubt the Court intended to sell the whole property as a mortgaged property.

The decision of the Privy Council in *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*, (1) appears to us to rule that, although it would have been more proper to have made the minor members of the family parties to the suit, the sale which has been made in pursuance of the decree will bind them, seeing that their eldest brother, the manager of the family, had been impleaded as the representative of his father by whom the property had been acquired. We must, therefore, reverse so much of the original decree in the present suit as dismissed the claim to possession and mesne profits from the date of suit, and adjudge that the plaintiff do obtain possession and mesne profits from that date, to be calculated in execution.

We refrain from awarding mesne profits prior to suit as the appellant slept over his rights; and inasmuch as the minor sons of Vírasámi Reddi were not made parties to the former suit, we shall direct each party to bear his own costs in both Courts.

Solicitor for appellant—*Tiruvengadasámi Pillai.*

(1) L.R. 6 I.A., 233.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

1884.
November 25.
1885.
February 21.

11 Mad. 12.

GOUSE (PLAINTIFF), APPELLANT,

and

SUNDARA (DEFENDANT), RESPONDENT.*

Rent Recovery Act, ss. 1, 79—Landholder—Assignee—Delegation of powers.

The interest of B in a permanent lease of a jágír was sold in execution of a decree and purchased by J, who assigned his interest to the plaintiff.

In a suit under Act VIII of 1865 (Madras) by plaintiff to compel defendant to accept a pattá, defendant objected that plaintiff had no right to enforce acceptance of a pattá under the Act:

Held, by the Full Bench (Turner, C.J., Muttusámi Ayyar, Hutchins, and Brandt, JJ.; Kernan, J., dissenting) that plaintiff was a landholder within the meaning of the Act and entitled to enforce acceptance of a pattá.

Zinulabdin Rowten v. *Vijien Virapatren* (I.L.R., 1 Mad., 49) dissented from.

THIS was an appeal from the decree of E. N. Overbury, District Judge of Salem, dated 2nd April 1884, reversing an order of C. M. Mullaly, Head Assistant Collector, in a summary suit brought under s. 9 of the Rent Recovery Act, directing defendant to accept a pattá from plaintiff.

On the 31st October 1884, the case was heard by a Division Bench (Hutchins and Brandt, JJ.).

Sadagopácháriyar for appellant.

Hon. *T. Rámá Ráu* and *Varada Ráu* for respondent.

On the 3rd November the case was referred to a Full Bench.

The following judgments were then delivered.

HUTCHINS, J.—The appellant brought this suit under s. 9, Act VIII of 1865, to compel a tenant to accept a pattá. There is no dispute about the terms of the pattá, but the question to b

* Second Appeal 715 of 1884.

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determined is whether the appellant is a landholder within the meaning of the Act. His position is briefly that of the assignee of a permanent lessee, while the respondent is most certainly a person bound to pay rent, in respect of the lands named in the pattá, to whoever may be entitled to such rent and therefore to the appellant.

It may be better, however, to state the facts rather more in detail. The estate is a jágír. The former jágírdár had ten sons and two daughters. He executed a permanent lease to one of his sons, Bade Kaja Sahib. Under a decree passed against Bade Kaja, his interest was attached and purchased by another of the sons, Jada Sahib, and Jada Sahib transferred his interests in 1874 to the appellant. Upon the appellant taking possession of the estate and attempting to give pattás, he was obstructed by his vendor and brought original suit No. 100 of 1874, in which his possession as permanent lessee was established against Jada Sahib. Notwithstanding this decree, the appellant seems to have met with considerable opposition, and the Head Assistant Collector, in disposing of this suit, characterized the defence as another attempt to prejudice his position. The respondent relies on a purchase in 1883 of the present interests of three of the late jágírdár's sons, viz., Bade Kaja, whose interest has passed to appellant under the Court-sale; Jada Sahib, who sold to the appellant and against whom appellant obtained judgment in 1874; and Chota Kaja Sahib. Bade Kaja formerly had the tenant-right in the lands mentioned in the present pattá; he sold it to a Goundan, who exchanged pattás and muchalkás with the appellant. The respondent has now bought it from that Goundan.

These facts seem hardly to be disputed. The Head Assistant Collector gave judgment for the appellant. The District Judge has taken no notice of the proceedings in the suit of 1874, and he rejected other evidence, which at least goes to show that the appellant has been the *de facto* landholder for a series of years. He finally dismissed the suit on the ground that the permanent lease would be the best evidence of the appellant's position as a permanent lessee, but he failed to notice that this lease should be with Bade Kaja, under whom the respondent claims, and that the appellant had established his *status* against Jada Sahib, under whom also the respondent claims.

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Upon these facts, and there appearing to be no real dispute as to there having been a permanent lease, we should have sent the case back to the Judge or given a decree for the appellant, but for the decision of a Division Bench in *Zinulabdin Rowten* v. *Vijien Virapatren*.(1) It was there held that the assignee of a "farmer from a landholder" was not himself a "farmer from a land-holder," and therefore not entitled to take proceedings under the Act to enforce acceptance of a pattá. It has always appeared to me that this decision was very questionable, but we are not entitled to overrule it and must, therefore, refer the point to a Full Bench.

I would draw attention first to the fact that the very learned Judges who decided that case had no practical acquaintance with the Act and do not seem to have been at all confident as to the correctness of their conclusion. They simply said "we are inclined to think that the Act does not apply to the case," and refused to disturb the judgment of the lower Court. I very much doubt if they had any idea of the consternation with which their decision was received up-country.

I would next point out that in construing this Act, VIII of 1865, the Courts have repeatedly found it necessary to recognize the fact that it was not drawn by a skilled draftsman and that the terms employed in it cannot always be limited to their strictest legal acceptation. It, therefore, becomes more than usually important to bear in mind the object which the legislature had in view in passing the Act. This object seems to me to have put very forcibly, and appropriately to the present reference, in *Vellaya* v. *Tiruva*.(2) "By the Regulation the obligation to grant pattás was imposed, and the power to collect rents by summary process was conferred not only on proprietors and farmers under Government, but on the farmers under proprietors. The same reason, the necessity for providing for the speedy collection of revenue, suggested the conferring of summary powers on farmers as well as proprietors; and the same object, the protection of the tenant, was promoted by imposing on farmers the like obligations as on proprietors." It is obvious that these observations apply at least as strongly to the assignees of farmers as to direct farmers under proprietors. Indeed the former require the summary

(1) I.L.R., 1 Mad., 49. (2) I.L.R., 5 Mad., 83.

powers even more than the latter on account of the opposition they are likely to incur. I have before had occasion to point out that, if the interpretation of the Division Bench is correct, the position of a farmer's assignee will generally be untenable. Take, for instance, the important zamíndárí of Sivaganga, the assignment of the lease of which was upheld in *Venkatasami Naick* v. *Kulandapuri Natchiar*.(1) Probably that assignee had more suits under Act VIII of 1865 than all the other "landholders" of the Presidency, but every one of them was wrongly decided if the view of the Division Bench is to prevail.

The judgment of the Division Bench concludes by admitting that the term "landholder" includes the direct descendants of those named in s. 1 of the Act and therefore of farmers or lessees. If direct descendants are included, why not collateral heirs, and why not all who succeed to the position of any of those named in s. 1, including transferees whether by assignment or operation of law?

A zamíndár may sell his zamíndári in certain circumstances. Is the purchaser not entitled to give a pattá? Or rather, is he not bound to do so? If the legislature intended that a purchaser or assignee of a zamíndár should be as the zamíndár and therefore a landholder, it must also have had the same intention with regard to the assignee of a lessee.

There is, however, another view under which the assignee of a lessee may come in. A person farming lands from a zamíndár is a landholder, and it appears to me that this may include persons farming directly or indirectly—by lease direct from the zamíndár or by an assignment of such lease which the zamíndár cannot dispute.

Again, the definition of landholders in s. 1 is, on its face, not exhaustive. It seems to have been suggested that, although s. 1 is not exhaustive, the list in s. 3 of persons who may and must give pattás is exhaustive, but, in my opinion, the two sections must be read together. It seems obvious that ss. 3 and 13 were intended to embrace all classes of landholders, or in other words all persons entitled to exact rent for land. The assignee of a zamíndár's lessee is certainly not a "landholder under raiyatwár settlement or in any way subject to the payment of land revenue

(1) 5 M.H.C.R., 227.

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direct to Government," nor is he "a registered holder of land in proprietary right." He does not, therefore, fall under s. 13. He must, therefore, fall under s. 3 if he is entitled to exact rent at all. But it is admitted, or was by the Judge whose decision the Division Bench refused to disturb, that he can exact rent by suit, and I do not myself see what answer there could be to his suit, except that which would of course be set up, viz., that he had not tendered a pattá. But, if he can tender a pattá, the very point is gained for which the appellant is contending. If he cannot, s. 7 would not prevent his suing; for he is not a landholder under the Act, consequently his tenants are not tenants within the definition given by the Act, and "a tenancy" in s. 7 must mean the tenancy of a tenant within that definition. Whether the tenants would in the end be benefited, if they succeed in their contention that the appellant is not a landholder, and therefore that he can sue them in the Small Cause Courts without their having the safeguard of a pattá, is a question to which they do not seem to have given sufficient consideration.

With these remarks, I would refer to a Full Bench the question, whether the decision in *Zinulabdin's case* is correct and whether the assignee of a person farming lands from a zamíndár or jágírdár is debarred from taking proceedings under Act VIII of 1865 and exempt from the obligations imposed on landholders of the class described in s. 3 and by that Act.

BRANDT, J.—I also desire that the question stated by my learned colleague be referred to a Full Bench.

With the greatest respect for the learned Judges who decided *Zinulabdin Rowten* v. *Vijien Virapatren*,(1) I have always entertained some doubt in respect of that case.

In *Ramasami Aien* v. *Manjeya Pillai*,(2) the question for decision was whether the plaintiff who held land under a lease from a landlord was a farmer within the meaning of the Act, and it was decided that he was while in *Chauki Gounden* v. *Venkataramanier*,(3) to which case also reference is made in *Zinulabdin's case*, as containing a distinction between farming and leasing, the distinction, if indeed it was intended as such, was drawn inci-

(1) I.L.R., 1 Mad., 49. (2) 6 M.H.C.R., 61.
(3) 5 M.H.C.R., 208.

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dentally only, the question for decision there being whether the poligar of an unsettled pollium was or was not a landholder.

One who, in the words of Holloway, J., "contracts to take all the profits of certain lands, and to pay a specified sum to the person from whom he takes" is a farmer under the Act. I do not gather that it was intended by that learned Judge to draw a distinction between farming, and taking a lease of, such rights. In *Vellaya* v. *Tiruva*(1) the learned Chief Justice says, the term *farmer* "also applies to persons who farm *or take a lease* of the rights of proprietors" on certain terms.

Nor do I understand that the learned Judges in appeal adopted the view apparently taken by the District Judge in *Zinulabdin's case* that an assignee of a lessee is a sub-renter, and therefore not in a position to enforce acceptance of a pattá. The assignee of the lessee was, it appears, held by the Division Bench in *Zinulabdin's case* to be not a landholder under the Act, because he was not the direct descendant of one of the persons coming within the class of landholders named in s. 1 of the Act.

I am doubtful whether this is sufficient reason for holding that on the assignment of a lease-hold interest, which it is assumed the original lessee can legally make, the assignee is not in a position to take such proceedings under the Rent Recovery Act as his assignor might have done.

On the 25th November the case was argued before the Full Bench.

Mr. Wedderburn and *Sadagopácháriyar* for appellant.

Hon. *T. Rámá Ráu* and *Varada Ráu* for respondent.

On the 21st February 1885, the following judgments were delivered:—

Turner, C.J.—The facts of the case, as I understand them, are as follow:—The former jágírdár, whose power to do so is not now disputed, made a permanent lease of the jágír to his son Bade Kaja Sahib. This lease was in fact a farm of the jágír.

Bade Kaja Sahib's interest was attached and sold under a decree obtained by his brother, Jada Sahib, who became the purchaser.

Jada Sahib sold his interest to the appellant. The permanent lease or farm consequently became vested in the appellant.

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(1) I. L.R., 5 Mad., 85.

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The term "landholder" is defined in s. 1, Act VIII of 1865, as including, for the purposes of that Act, *inter alia*, jágírdárs and all persons farming lands from jágírdárs.

Primâ facie then the appellant is a "landholder" within the meaning of the Act. But it is argued that s. 79 impliedly prohibits assignees from exercising the summary powers conferred by the Act on landholders without delegation and that the appellant is assignee of a landholder.

In one sense a farmer is an assignee, but it is clear that the term "landholder" includes farmers from jágírdárs. Therefore, Bade Kaja Sahib clearly had the summary powers conferred by the Act. It is, however, argued that assuming he had the powers the appellant has not, because he is an assignee of the farm. It is no doubt true that the appellant is in one sense an assignee: he is an assignee of all the rights of the farmer; but it does not follow that he falls within the purview of s. 79.

I may observe that section is an enabling section. It was not intended to deprive any person who enjoyed powers under the other sections of the Act of the authority conferred on him by the Act, but to enable the persons defined as landholders to delegate their powers to persons to whom the other provisions of the Act did not extend.

The term "assignee" in this section when read with the context appears to me to mean not a person who stands in the shoes of a landholder in relation to the tenant, but a person whose position does not interfere with the direct relation of the tenant to the landlord and who stands to the landlord in the position of an agent for the purpose of collecting the rent. This description applies neither to a farmer nor to a person who has acquired the whole interest of a farmer but to a person to whom the rents have been assigned, *e.g.*, a landholder may agree with his creditor that he shall collect the rents and apply them in reduction of the landholder's debt. Such an assignee, though he has the right to collect the rent, does not disturb the direct relation of the tenant to the landholder and he cannot exercise the summary powers under the Act as a landholder. If the enjoyment of the summary powers was to be conferred on him, this could only be effected by delegation. The use of the term "principal" in s. 79 is thus satisfied, and it would not be satisfied by the construction proposed. It

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does not express the relation of a landholder to a person who has acquired by purchase the interest of a farmer. The observation of Mr. Justice Hutchins that a "landholder" cannot delegate powers he has ceased to possess appears to me conclusive. The provisions of s. 80 were necessary to confer on heirs and representatives powers to collect *arrears*, which, in whole or in part, would belong to the estate of the person they represent, and I do not think that the provisions of this section throw any light on the provisions of the preceding section.

KERNAN, J.—I understand that the permanent lease granted to Bade Kaja Sahib constituted him a farmer under the jágírdár within the meaning of the Regulation and Rent Act as explained by the Full Bench in *Vellaya* v. *Tiruva*(1) and the cases there referred to. His interest in that farming lease was seized and sold in execution against him and was purchased by Jada Sahib in 1874, who, I assume, obtained certificate under s. 259, Civil Procedure Code, and thus got a valid transfer.

Jada Sahib transferred the interest in the farming lease to the plaintiff.

Bade Sahib did not delegate his powers as landholder under Act VIII of 1865 to Jada Sahib or to the plaintiff.

The defendant, though one of the jágírdárs, there being several entitled to the rent reserved by the lease to Bade Kaja Sahib, is also a tenant in occupation of part of the land comprised in the permanent lease.

The plaintiff sues to compel the defendant to accept pattá under the Rent Act. The defendant contends that plaintiff is not a landholder under s. 3 of Act VIII of 1865 and is not entitled under that Act to compel acceptance of pattá, inasmuch as he is only an assignee of an assignee of a landholder who did not delegate to the plaintiff or to his assignor the powers given by the Act.

If s. 79 did not provide for the cases of assignees of landholders, I would consider that such assignee, that is a transferee for the full interest in the farming lease, would be a landholder within the meaning of s. 3 of the Act as a farmer under the jágírdár without the necessity for any delegation of powers. There might be several such transfers from time to time, and each succeeding transferee would be a landholder within the mean-

(1) I.L.R., 5 Mad., 85.

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ing of s. 3. The position of the original farmer and of each assignee from and after him as regards the tenants would be that he would be only answerable to the tenants for any damage done by him or his agent during his own time and would not be liable after assignment for any act not done by him or his agent. However, s. 79 is inconsistent with such position. The Act when it gave the summary powers to landholders as against their tenants contains various restrictions on the exercise of those powers to prevent damage and injustice to the tenants. Section 79 contains the first reference to such powers being exercised by agents or assignees of landholders, and s. 80 contains the first reference to such powers being exercised by heirs or legal representatives of landholders.

The terms of s. 79 are "landholders are authorized to delegate to their agents or assignees all the powers given to them by this Act, and any persons injured by such agents or assignees shall be allowed to sue either them or their principal or both—provided always that the principal shall in no case be liable to imprisonment, nor to any greater damages than the plaintiff has actually suffered where the act complained of was committed by his agent or assignee and was not sanctioned by him." Now, although it is not inconsistent with this section that the landholders had a right to appoint agents to act for them in respect of the interest vested in them, or inconsistent with the rights of landholders to assign such interests according to the ordinary law and right of property, yet it is inconsistent with such agents or assignees exercising the summary powers given by the Act, unless such powers were delegated to them by the landholders. If it was the intention of the Act that the agent or assignee could exercise those summary powers, what was the necessity for introducing this enabling clause? If it was the intention of the Act that the landholders under the provisions of the Act prior to s. 79 were left free to delegate their powers if they chose, then s. 79, as regards the power to delegate, would be unnecessary. The only construction, therefore, as it appears to me, in respect of the first part of s. 79 is that it was not intended by the prior part of the Act that the landholder should have authority to delegate such powers and that unless the delegation of such powers was authorized expressly, the agents or assignees should not have such powers.

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Then, the next part of s. 79 provides that, notwithstanding such delegation of powers, the persons injured by the exercise of the powers may sue the agent or assignee or their principal (meaning the landholder) or both, but limits the liability of the principal to actual damage suffered by the plaintiff and from imprisonment. This portion of s. 79 is not consistent with the general right of a landholder, who, as above stated, is only responsible for acts done by him or his agent and is not responsible for acts done by others without his concurrence after he has assigned all his interest.

This is a valuable provision in favour of the tenants, but it only operates when the assignee acts under delegated powers. The object of s. 79 was, in cases of assignments by landholders, *e.g.*, farmers, by authorizing the delegation of powers, to give summary remedies on the one hand and on the other hand to give the tenants additional remedies in case of injury when they were subject to the exercise by assignees of summary powers.

If the plaintiff is entitled to exercise the summary powers, though he has not got a delegation under s. 79, then of what value is the proviso of that section to the tenants who may be injured? Moreover, in that case the remedy provided by s. 79 for the tenants against Bade Kaja Sahib in case of injury, say by the plaintiff in exercise of the powers, will not be available.

Plaintiff may recover his rent in a Civil Court, but not by summary remedy under the Act.

In case of an assignment by operation of law to the heir or legal representative, the right to exercise the power goes with the estate, s. 80. This clause and s. 79 seem to prove that the summary powers were in the first part of the Act confined to the zamíndárs, &c., and farmers under them personally. Sections 79 and 80 provided for the cases of agents and assignees under delegated powers and for heirs and representatives. I think that *Zinulabdin's case*(1) is not correctly reported, or, if it is, the point now before us does not appear to have been decided. Mr. Justice Holloway says "this man, the plaintiff, is not a direct descendant of any zamíndár, &c. He is, therefore, not a landholder under the Act. This seems to dispose of the case."

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(1) I.L.R., 1 Mad., 49.

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In *Vellaya* v. *Tiruva*(1) Mr. Justice Kindersley referring to *Zinulabdin's case*(2) says of that case "it was decided that the *sub-lessee* of the representatives of a lessee was not a landlord as defined by the Act."

The point in this case seems to me not to be concluded by the Full Bench judgment in *Vellaya* v. *Tiruva*.(1) There we held that if a mortgagee is to take possession and give credit, or account for a sum certain to the proprietors on account of the collections, he is a farmer *pro tanto* and has the power, and that, when the rights of a mortgagor in respect of the enjoyment of property are simply assigned to the mortgagee, in such case the mortgagee has the powers conferred by the Act on landholders only if they have been delegated to him by s. 79.

That was the case of a mortgagee from a zamíndár. In this case I believe it is not contended that the plaintiff is a farmer under the Act. He is only the assignee of an assignee of the estate and interest of Bade Kaja Sahib, who was a *farmer* under the jágírdár. Plaintiff, therefore, is an assignee of a farmer, but as he has not had a delegation of powers under s. 79 of the Act, he is not entitled to exercise the summary powers given by the Act. A zamíndár, &c., who has made a farming lease or grant without delegating powers, still retains the powers incident to his estate and may grant them afterwards to his farmer. But a farmer with delegated powers, who assigns his interest, should on the assignment assign his powers. But I think an assignment of all his estate and interest would carry the right to exercise the powers. I am unable to agree that the observation of Mr. Justice Hutchins referred to by the Chief Justice is at all conclusive.

I would reply to the reference that the decision in *Zinulabdin's case*, as reported, does not appear to bear on this case and that the assignee of a farmer from a zamíndár, &c., is debarred in respect of that interest from taking proceedings under Act VIII of 1865 unless the farmer delegated to him, or to his assignor, and his assignee, under s. 79 the power given to the farmer by the Act.

MUTTUSAMI AYYAR, J.—The question which is referred for our decision in this case is whether the appellant is a landholder within the meaning of Act VIII of 1865. The facts from which it arises are shortly as follow:—The lands in the respondent's

(1) I.L.R., 5 Mad., 76. (2) I.L.R., 1 Mad., 49.

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possession are situated in a jágír. The former jágírdár granted a permanent lease of the jágír to his son, Bade Kaja. Bade Kaja's interest passed by a Court-sale to his brother, Jada Sahib, who since sold his interest to the appellant. The appellant sued under s. 9, Act VIII of 1865, to compel the respondent to accept pattá from him for Fasli 1292.

The respondent contended that the appellant was not a landholder entitled to enforce the acceptance of pattá. It is not denied that the permanent lease is an ijárá or farm. Nor is it disputed that Bade Kaja was a person farming land from a jágírdár, and therefore a landholder according to ss. 1 and 3 of the Act. It is also not doubted that, if Bade Kaja's interest passed by the operation of law to his heir or legal representative, such legal representative would be competent to exercise the powers conferred by the Act upon landholders. The question then, as to which there is a difference of opinion, is whether the appellant, who purchased the farm from Jada Sahib but did not obtain it either from the jágírdár direct or from Bade Kaja by operation of law, is a landholder.

In so far as the right to rent is concerned, it is of no moment under the general law of landlord and tenant whether the transfer to the appellant is the first or second or third transfer or whether it is voluntary or by operation of law. The only conditions necessary to give him a right of suit as against the tenant are that the transfer is valid, and that the interest transferred is such as would actually substitute the purchaser for the former landlord as farmer. Attornment by the tenant is not required to validate the transfer though the tenant may not be prejudiced by paying rent to the former landlord until he has notice of the transfer.

If the former landlord sued for rent, the transfer of his entire interest in the farm and the notice of the transfer to the tenant would be a sufficient answer to the claim in India as it would be in England.

In support of these views I may refer to the English law of attornment contained in Woodfall's Landlord and Tenant, page 243, especially to Statutes 4 & 5 Anne, c. 16, ss. 9 and 10. 11 Geo. II, c. 19, s. 11, and the general law in India is in substance the same as would appear from *Vellaya* v. *Tiruva*.(1)

(1) I.L.R., 5 Mad., 84.

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This being so, the next question is whether s. 1 or s. 69 of Act VIII of 1865 bars the recognition of the appellant as the landholder to whom the respondent is liable to pay rent.

A person farming land from the jágírdár is expressly named in ss. 1 and 3 as a landholder for the purposes of the Act. It is not denied that the person who takes the farm first is a landholder. Nor is it denied that his heir or legal representative is a landholder. Is there any sufficient reason then for saying that the appellant who is a purchaser of the farm is not? The words are "persons farming lands from the jágírdár." Do they mean persons who take the farm from the jágírdár in the first instance, or do they include those who lawfully take his place by right of purchase in regard both to the right to sue the tenant for rent and to the liability to pay the ijárá amount to the jágírdár, or in other words in regard to the ownership of the farm. It seems to me that they ought to be taken in the latter sense. Section 80 indicates that the intention was to include heirs and legal representatives. It is reasonable to say that they refer to the jágírdár or farmer having some present interest and not to one who was in some former time a jágírdár or farmer.

It is then suggested that s. 79 discloses an intention to exclude all assignees taking the farm by the voluntary act of the landholder from the class of landholders in order that the tenant may not be deprived of his remedy against the original landlord for the abuse of powers conferred by this Act. I do not think that s. 79 admits of such construction. The first part authorizes landholders to delegate to their agents or *assignees* the powers conferred upon them by the Act. As the term "landholder" is specially explained in s. 1, we must read it in construing s. 79 in the sense in which it is used in s. 1. Taking the word then to include any person who farms land from the jágírdár, or any one who lawfully succeeds him by purchase as landlord, the assignee referred to in the section must be some assignee who does not in law displace him as the tenant's landlord. It is conceded that Bade Kaja and Jada Sahib were landholders within the meaning of s. 79. The latter part of the section speaks of the landholder as the principal. Both then reason and the context seem to me to show that the principal referred to is one between whom and the tenant the relation of landlord and tenant still continues to subsist primarily and not

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one who stood in that relation at some former period but who has since ceased to do so. It is said that the tenant's remedy would then be impaired. The answer to the objection is that it is impaired no more than it would be if Bade Kaja still continued to hold the farm. The section premises three classes of persons, first, the landholder who may still be regarded as the principal; secondly, his agent or assignee who is specially authorized to exercise for him and on his behalf the powers conferred by the Act, and thirdly, the tenant. As I read s. 1, the appellant stands in the first class, and if I am right, it follows then that he cannot also stand in the second. The section must therefore be taken to refer to assignees who have secondary or subsidiary interests but whose legal relation *quoad* the exercise of the powers conferred by the Act is still analogous to that of an agent in that the power has to be exercised for the benefit and on behalf of the landholder for the time being having some subsisting interest. It seems to me that it is not correct first to presume that the tenant must have a certain remedy and then to place a construction on the word "landholder" at variance with s. 1, instead of taking the word as defined by s. 1 and confining the remedy of the tenant to the middlemen exercising the power and to the person who lawfully occupies for the time being the position of a farmer from the jágírdár. The presumption itself is unreasonable, for according to it, a liability attaches to a person who neither abuses the powers conferred by the Act nor indirectly benefits by their exercise. Further, the section implies that the powers conferred by the Act are incidents attaching to the *status* of a landholder, and when that *status* is once effectually transferred, I doubt if a special delegation is at all needed.

In *Vellaya* v. *Tiruva*,(1) it was observed "that the effect of the instrument (then before the Court) was not only to create a mortgage but also a farm of the mortgaged villages, determinable in whole or in a specified part, at the end of any fasli year. The mortgagee is, therefore, a landlord within the meaning of Act VIII of 1865 and is entitled to enforce the acceptance of a proper pattá."

The result is that, in my judgment, the appellant in the case before us is entitled to enforce the acceptance of pattá.

(1) I.L.R., 5 Mad., 87.

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HUTCHINS, J.—In referring this case to a Full Bench I endeavoured to show that the assignee of a person farming lands from a zamíndár, &c., came within the definition of a landholder given in s. 3 of the Act. I understand that all my learned colleagues would have come to that conclusion but for the provision of s. 79, which speaks specifically of the assignees of landholders. I shall, therefore, confine my present remarks to the questions, whether such an assignee as the appellant in this case comes under s. 79, and whether s. 79 was introduced for the purpose of restricting or controlling the definition given in s. 3.

Section 79 appears to me to be one of a series of supplemental sections introduced at the end of the Act to provide for cases not previously dealt with. It is an enabling section, and so far from restricting the powers already conferred on all landholders, it gave them the additional right to exercise their powers through "agents or assignees," provided only that as the "principal" of such agent or assignee the landholder should himself remain answerable to his tenants for any wrong done by such agent or assignee. This proviso seems to me to presuppose that the landholder still remains the principal in relation to the agent or assignee and the landlord of the tenant. If his right to collect rent has been wholly and conclusively determined, as by a Court-sale of his entire right, title and interest, his powers must also have been determined, and he cannot delegate to another what is no longer vested in himself. He then ceases to be either principal or landlord, and the person in whom his entire right, title and interest has become vested stands in his shoes as the landholder. In my judgment, therefore, the word "assignee" in s. 79 does not include the transferee of a landholder's entire interest such as the appellant in the present case. I would answer the question referred in the negative.

BRANDT, J.—It is certainly a question which requires consideration in the case before us whether or not, having regard to s. 79 of the Rent Act, assignees of landlords do not require delegation to them, capable of proof, by such landlords of the powers given to the latter under the Act.

The answer to this depends in great measure upon the meaning to be placed upon the words "their agents or assignees" in that section. And had not some doubts arisen in my mind with reference to certain observations in *Vellaya* v. *Tiruva*, a Full Bench case, I

should have had little, if any, hesitation in holding that the word "assign" as there used is used in the sense of "a person appointed by another to do any act or perform any business for "that other" (in which sense the word is sometimes used), rather than as describing a person "who takes an interest in the land or real estate of the landlord by an assignment from the landlord;" that is that it refers to an assignment of powers and not to the assignment of an estate. My reasons for thinking that this is so are that s. 79 of the present Rent Act appears to be an adaptation, reproduction, or intended amendment of s. 42 of Regulation XXVIII of 1802, which Regulation empowered landholders and farmers of land to distrain and sell the personal property of under-farmers and raiyats in certain cases for arrears of rent, and s. 42 authorized such landholders and farmers "to delegate to their naibs, gumastahs and other agents employed in the collection of rent the power of distraining, on their behalf, in the manner prescribed in the Regulation," subject to certain penalties in the case of abuse of the powers so conferred, and subject also to the responsibility of the landlord.

Madras Act VIII of 1865 does not profess to do more than "consolidate and simplify various laws which have been passed relative to landholders and their tenants, and to provide a uniform process for the recovery of rent," and having regard to this fact and to the position which s. 79 occupies in the Act and to the provisions of s. 42 of the Regulation of 1802 for which it is substituted, and to the fact that s. 8 of Regulation XXV of 1802, unrepealed and unaltered, expressly recognizes the rights of proprietors of land to transfer by sale, gift or otherwise, without the previous consent of Government or any other authority, the proprietary right in the whole or any part of their zamíndáríes consistently with the requirements of Hindú and Muhammadan Law and in a manner not prohibited by the Regulations of the British Government, I have no doubt that the word "assigns" in s. 79 of the present Act was used as an amplification only of, and in the same sense as that in which the word, "agents" is used, the two words being substituted for the words "naibs, gumastahs or agents" in s. 42 of the old Regulation. The use of the word "principal" only in s. 79 of the Rent Act appears to me to support this view.

The decision in *Vellaya* v. *Tiruva*,(1) in respect of the powers

(1) I.L.R., 5 Mad., 85.

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of a mortgagee, apart from express assignment of powers under s. 79, to exercise the powers of landlord under the Act as a farmer, if the effect of the instrument of mortgage be not only to create a mortgage but also a farm of the mortgaged villages, appears to me to apply with at least equal force to the case of a lessee to whom a landlord has made over all his rights in the property except a right to receive a fixed sum payable by the lessee "in consideration of obtaining such proportion of the profits of an estate as he (the proprietor) was entitled to." That there is no distinction for the purposes of the Act between leasing and farming appears to have been assumed by the learned Chief Justice in *Vellaya* v. *Tiruva*(1) (as I remarked in my observations in the order of reference in this case), and I am still of opinion that it was not ever intended in this Court to draw any distinction between the two.

The power of proprietors to deal with their property by way of transfer by sale or otherwise in any manner not contrary to law, having then been distinctly recognized, and the general rule being that "every one who has an estate or interest in land and tenements may assign it, as tenant for life, for years, &c.," (Comyn's Digest, Vol. 5, p. 686, 5th edition), is there anything in the unrepealed Regulations or in the Rent Act by reason of which, having regard to the aim of legislation on this subject, viz., protection of tenants from undue exactions or oppression on the part of landlords to whom special and summary means for speedy realization of rents are given, it must be held that there is an exception to the general rule, and that an assignee of a farmer or lessee does not stand in the place of the farmer or lessee?

If there is under s. 79 of the Act an assignment or delegation of the landholder's powers, the landholder's responsibility no doubt still continues, along with the liability of the assignee. Does the landholder's liability continue when he farms or gives a lease to another?

Under s. 8 of Regulation XXV of 1802 the landholder is still answerable to Government if he does not register the transfer in the manner therein provided, but there is not, as it appears to me, any express provision in the Regulations or the Act, under which, when he has divested himself of all interest in the property except a right to receive from a farmer or lessee a fixed sum, he is still liable to the tenants for wrongful acts done under the color of the act by the farmer or lessee, who, standing in the place of the land-

(1) I.L.R., 5 Mad., 85.

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holder, is subject to the obligations and invested with the summary powers of distraint conferred on the landholder under the Act. And, if this is so, it does not appear to me what difference it can make whether such a farmer or lessee transfers his interest to another: the tenant is not consulted as to the choice of the original lessee or farmer any more than he is as to the selection of an assignee of the lessee, who again can only exercise powers of summary distraint if he fulfils the obligations imposed on him as filling the place of a landholder.

Tenants would no doubt be justified in refusing to attorn to a farmer or lessee unless, by due notice given to them by the landholders or otherwise, they be made aware of the transfer, and are authorized and desired to pay rent to the transferee, and so they would be on an assignment by the farmer or lessee, but, subject to these conditions, and under the restrictions above-mentioned, it appears to me that the tenant's rights are sufficiently protected, and that there are not grounds for holding that the assignee of a lessee is not a landholder for the purposes of the Rent Act.

I am of opinion that the appellant is not debarred from taking proceedings under the Rent Act.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

SANKARANÁRÁYANA (DEFENDANT), APPELLANT,

and

KUNJAPPA (PLAINTIFF), RESPONDENT.*

1885. March 21. April 1.

Rent Recovery Act, s. 51—Presentation of plaint—Acceptance by Court of plaint sent by post.

K sent a plaint by post to a Revenue officer, who was on tour and, in obedience to an order issued by such officer to pay batta within a certain date, presented himself and paid the amount demanded within thirty days from the date of the cause of action:

Held, that the suit was instituted within the time prescribed by s. 51 of the Rent Recovery Act—*Moparti Pitchi Naidu* v. *Vuppala Kondamma* (6 M.H.C.R., 136) approved and distinguished.

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* Second Appeal 3 of 1885.

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SANKARA-NÁRÁYANA v. KUNJAPPA.

This was an appeal from the decree of J. W. Best, District Judge of South Canara, dated 9th August 1884, reversing the decree of K. Rámá Ráu, Deputy Collector of South Canara, in a summary suit brought under the Rent Recovery Act by Kunjappa against Sankaranaráyanácháryar to recover damages for an alleged illegal distraint. The defendant objected that the suit was not instituted within the thirty days allowed by s. 51 of the Act.

The Deputy Collector dismissed the suit on the ground that the plaint had not been properly presented, having been sent by post—*Moparti Pitchi Naidu* v. *Vuppala Kondamma.*(1) The District Judge, on appeal, held that the plaint having been accepted by the Assistant Collector, had under the circumstances been properly presented.

The defendant appealed to the High Court.

Srinivasa Ráu for appellant.

Rámáchandra Ráu Sahib for respondent.

The Court (Turner, C.J., and Brandt, J.) delivered the following judgments:—

TURNER, C.J.—The goods of the respondent were distrained by the appellant. The respondent thereupon went to Mangalore, a distance of forty miles from his house, to institute a suit under the Rent Act.

The Assistant Collector in charge of the taluk was absent on tour and the respondent not being able to ascertain his exact whereabouts, on the 23rd May added a statement to that effect to his petition and sent it by post to the Assistant Collector. He received in reply a notice that he was to pay batta and produce a list of witnesses within fifteen days, or his plaint would be thrown out. According to the evidence of his vakíl, who is supported by the evidence of the clerk of the Assistant Collector, the respondent accompanied by his vakíl presented himself at the Assistant Collector's quarters, and paid the batta on the 15th June.

It is admitted that the suit would have been in time if the plaint had been presented on that day.

From the 15th to 20th June the Assistant Collector had, according to the clerk's evidence, no time to attend to such ordinary business. He was not allowing parties or petitioners to go before him unless sent for. The Judge finds it proved that the batta

(1) 6 M.H.C.R., 136.

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was paid by the plaintiff accompanied by his vakil on 15th June, and has held that the plaint having been accepted by the Assistant Collector, was, under the circumstances, sufficiently presented.

The presentation ought to have been made to the Assistant Collector and the Act does not state it may be sent by post. The Assistant Collector might have refused to accept it and, if he had done so, the presentation would, this Court has ruled, not have been valid; but in the present case, as the Judge has pointed out, the plaint was accepted. The plaintiff presumably under the Assistant Collector's order received notice that he was to pay batta and that if he failed to do so his plaint would be rejected. He obeyed the order. This in itself I think would have been sufficient to justify the Court in holding that, although the plaint should not have been received unless it was presented by the plaintiff or by a pleader or agent on his behalf, nevertheless, as it was accepted, the suit was sufficiently instituted. But when the plaintiff presented himself with his pleader and paid batta he must be deemed to have presented the plaint on that day, if not before, and the objection that the suit was not properly instituted was rightly overruled by the Judge.

It can hardly be contended, in view of the original defence. that the respondent had executed leases (Exhibits I, IV and V), which, the Judge holds, are not proved that the parties dispensed with an agreement in writing. The appeal fails and must be dismissed with costs.

BRANDT, J.—In this case the distraint was made on the 16th May 1883; the petition or plaint which appears to have been written by, or on behalf of, the respondent, is dated 23rd May; it was, it seems, sent by post registered, and was no doubt received in the office of the Assistant Collector on the 26th idem: the stamp is obliterated, but on it appear what are evidently the fragments of the initials of the Assistant Collector, and the date, 26th May 1883. On the margin of the petition there are written in pencil these words—"Notice issued to produce process-fees within fifteen days, 1st June 1883"—there is no signature, nor initials to these words. The Assistant Collector's clerk deposes that a list of witnesses, which was put in by the respondent or some one on his behalf was initialled by that officer on the 20th June; the clerk says that between the 15th and 20th June the Assistant had no leisure to attend to ordinary business; that when the respondent paid his

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SANKARA-NÁRÁYANA v. KUNJAPPA.

batta his vakíl, Anantayya, had also come; and that though he cannot say on what date the respondent or his vakíl produced his batta and list of witnesses he believes that the plaintiff did appear and do what he was called upon to do within the 16th June, "otherwise they" (the fees?) "would not have been accepted."

Evidence in support of these statements is also given by Anantayya, plaintiff's vakíl.

The District Múnsif considered this evidence not very trustworthy and altogether insufficient to prove that the respondent's plaint had been in any way accepted or acted upon by the Assistant Collector as a plaint, within thirty days from the date of the cause of action; but the District Judge appears to accept it as true.

In second appeal, we are bound to take the District Judge's finding on the facts, and, assuming, as I do, that he finds in effect that the respondent and his vakil both appeared at the Assistant Collector's office on the 15th June in connection with and for the purpose of obtaining issue of process on the plaint sent by post, that they on that day paid batta and put in a list of witnesses as directed by the Assistant Collector, and that it was through no fault of theirs that that officer was not accessible in his Court as a Revenue Court till the 20th June, there may, in this particular case, be held to have been a sufficient presentation of a plaint for the purposes of the Act.

The decision in *Moparti Pitchi Naidu's case*(1) appears to me correct in principle, and there are in my opinion obvious reasons why petitions sent by post should not be accepted as plaints presented under the Rent Recovery Act.

I do not agree that a mere order calling on the plaintiff to pay batta, if passed on such a petition sent by post, would be sufficient to constitute acceptance of a plaint: and it is only on the assumption that the District Judge found that the respondent, with his vakil, in person appeared at the Assistant Collector's Court in connection with this summary suit before the 16th June that I concur in thinking that there was on the 15th idem what may be taken to have been a presentation of the plaint as required under the Act.

(1) 6 M.H.C.R., 136.

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17 Mad. 273.
18 Do. 463.
19 Do. 161.
25 Do. 314. 569.
41 Mad. 48.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

UNNIAN (DEFENDANT No. 2), APPELLANT,

and

RÁMÁ (PLAINTIFF), RESPONDENT.*

1884. October 30.
1885. March 31.

Malabar law—Kánam tenure—Redemption on terms of admitted demise—Improvements—Local custom—Jenmi's right to a meiety—Arrears of rent, Jenmi's right to deduct from amount payable by him.

In a suit brought against A and B for redemption of land, alleged to have been demised to A on kánam tenure in 1874 and to be held by B under A, it was found that the demise of 1874 was invalid because it had been executed fraudulently, but inasmuch as B admitted that he was in possession under a similar demise of 1855 it was *held*, that the plaintiff was entitled to redeem on the terms of the demise admitted by B. *Kunhi Kutti Nair* v. *Kutti Maraccar* (4 M.H.C.R., 359) followed.

Local usage of Ernád, by which the jenmi on redemption of a kánam takes credit for one-half of the value of improvements effected by the kánamdar, upheld.

The right of a jenmi to deduct arrears of rent from the amount payable by him on redemption of a kánam, being a customary incident of the tenure, is not affected by the three years' period of limitation for recovery of arrears of rent.

THIS was an appeal from the decree of E. K. Krishnan, Subordinate Judge of South Malabar, confirming the decree of P. Govinda Menón, District Múnsif of Ernád, in suit 215 of 1883.

The plaintiff, Rámá Nambi, sued the defendants, Kathi Amma and Natuthodiyil Unnian, to recover certain land demised on kánam, together with arrears of rent from 1051 (1876), "to be set off against a corresponding amount of the kánam advance" due by plaintiff, Rs. 177-12-0.

The rent reserved was alleged to be Rs. 10 per annum.

Defendant No. 2 denied that he held under this demise, but admitted that he held under a kánam of 1855, for Rs. 177-8-0, at an annual rent of 12 annas, and claimed Rs. 3,000 improvements.

The District Múnsif found that the kánam on which the plaintiff sued was invalid on the ground of fraud, but decreed that, on payment by the plaintiff of the amount of the kánam admitted

* S.A. 591 of 1884.

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by defendant No. 2 and one-half of the value of improvements (the other half being allowed to the jenmi in accordance with local custom) Rs. 1,031-10-3, *minus* the arrears of rent at 12 annas per annum, defendant No. 2 should surrender the land.

On appeal the Subordinate Judge confirmed this decree.

Defendant No. 2 appealed to the High Court on the following grounds:—

(1) The demise on which plaintiff brought this suit having been found to be false, the suit ought to have been dismissed.

(2) Plaintiff has not given notice to defendants to surrender the lands.

(3) Defendant No. 2 ought not to have been made liable to pay plaintiff's costs.

(4) Plaintiff's claim to more than three years' rent is barred by limitation.

(5) The indiscriminate deduction of half the value of improvements in favor of the jenmi is unwarranted by law or by the custom of the country.

Gopálan Náyar for appellant.

Sankaran Náyar for respondent.

The Court (Muttusámi Ayyar and Hutchins, JJ.) delivered the following

JUDGMENT:—It is not denied that the relation between the respondent and the appellant is that of mortgagor and mortgagee, and there is therefore no doubt that the latter was entitled to a decree for redemption. The respondent alleged that there was a renewed demise in 1049 (1874), but the appellant contended that the kánam purchased by him was that of 1030 or 1855. In so far as the mortgage debt is concerned, this contention is immaterial, as the amounts of the original and the renewed kánams are the same. Though there is a difference in the rates at which rent was payable, the Courts below were entitled to adopt the rate mentioned in the admitted demise of 1030, and the appellant cannot be prejudiced by it. As to the contention that the appellant was not called upon before suit to surrender the land, the suit itself may be regarded as a demand so far as the right of redemption is concerned. The question then is only material, if at all, in regard to costs; but as the appellant resisted the respondent's title to a

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decree for redemption in this suit, on the ground that the demise sued upon was not true, and persisted in that contention on appeal, notwithstanding the decision of the Hight Court in special appeal No. 113 of 1869 that the mortgage relied upon by a defendant as genuine may be made the ground of a decree in the plaintiff's favour if the relief granted be substantially such as was claimed in the plaint—*Kunhi Kutti Nair* v. *Kutti Maraccar* (1)—we cannot say that the Judge was wrong in assessing the appellant with the respondent's costs. Another objection which requires to be noticed is that the deduction of half the value of improvements in favour of the jenmi is not warranted by the custom of the country. The District Múnsif has found that the deduction has been made in accordance with the usage obtaining in Ernád, where the land in suit is situated, and the Judge has virtually adopted the finding. The appellant has not shown that there was no such usage although it was open to him to have produced evidence in support of his contention, and the existence of a similar custom has been recognized in second appeal No. 30 of 1881.

The only question then which remains to be decided is whether the respondent was entitled to deduct from the kánam debt due by him the rent in arrear for more than three years. In the case before us, the respondent has been permitted to deduct from the amount due by him arrears of porapád (rent) from 1051 to 1058 inclusive, and it is argued that the claim to more than three years' rent is barred by limitation. It would clearly be so, unless, by the usage of the district, the jenmi is entitled to treat his right to deduct the arrear of rent at the date of redemption as an incident of the kánam demise. In *Shaikh Rautan* v. *Kadangot Shupan*, (2) the jenmi sued to eject the kánamdár on the ground that the rent was in arrear. The Court held that the kánamdár did not forfeit his right to hold for twelve years, and that the jenmi might either sue for the rent in arrear or debit it against the mortgage amount. In *Kunju Velan* v. *Manavikrama Zamorin Raja* (3) the High Court, whilst holding that the jenmi is not entitled to oust the kánamdár for non-payment of porapád (rent), observed, that in such cases, the mortgagee is entitled to the occupation of the property for the period of twelve years from the date of the mortgage notwith-

(1) 4 M.H.C.R., 366. (2) 1 M.H.C.R., 112. (3) 1 M.H.C.R., 113, note.

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UNNIAN v. RÁMÁ.

standing such default, and that the proprietor may in the meantime recover the arrear by suit or take credit for the amount on paying off the kánam mortgage after the lapse of twelve years. Again, in *Krishna Mannadi* v. *Shankara Manavan*,(1) the Court adverted to certain proceedings of the Sadr Court, dated the 5th August 1856, as embodying a similar opinion. These cases leave no room for doubt that in return for the term of twelve years, for which the kánamdár is entitled to occupy the property demised, the jenmi is entitled either to sue for the rent in arrear or to take credit for it when the mortgage is paid off on the expiration of twelve years. The right to take credit for the arrear on the occasion of redemption is, therefore, an incident of the tenure, and as such of the kánam demise, and there can be no question of limitation. The same view has been recently expressed in *Kanna Pishárodi* v. *Kombi Achen* (2) by another Division Bench.

We are of opinion that the second appeal fails and must be dismissed with costs.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1885. March 31.

34 Cal 305

GOPÁLASÁMI AND OTHERS (DEFENDANTS), APPELLANTS,

and

SANKARA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 503—Powers of receiver.

In 1879 a zamíndár granted a lease of part of the zamíndárí for twenty years, reserving a rent of 18,000 rupees per annum.

In 1881, the zamíndárí having been attached by a creditor, the zamíndár granted a new lease in perpetuity in lieu of the former lease, reserving a rent of Rs. 12,000 a year.

A receiver of the zamíndárí, having subsequently been appointed with full powers under the provisions of s. 503 of the Code of Civil Procedure, sued the lessee to recover rent at the rate reserved in the first lease from 1881 :

Held, that the receiver was entitled to recover the rent claimed.

The provisions of s. 503 of the Code of Civil Procedure were intended to declare that the receiver, in respect of all property which was or could be attached, had

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(1) M.H.C.R., 113, note. (2) I.L.R., 8 Mad., 381. * Appeal 120 of 1884.

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the powers of the owner as they existed at the time the property was brought under the orders of the Court by attachment, provided that they have not ceased by operation of law.

THIS was an appeal from the decree of C. Rámáchandra Ayyar, Subordinate Judge of Madura (East).

The plaintiff, Sankara Ayyar, receiver of the Sivaganga zamíndári, sued the defendants, the sons and grandson of Kasivisvánada Náyakar, who obtained a lease of seventeen villages in the zamíndári from Dorasinga Tévar, the late zamíndár of Sivaganga, in 1879, to recover rent for three years from fasli 1291 (1881). The plaintiff obtained a decree for Rs. 31,816-7-10.

The defendants appealed.

The facts necessary for the purpose of this report appear from the judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.).

Bháshyam Ayyangár and *Kalianarámayyar* for appellants.

Hon. *Subramanyayyar* for respondent.

JUDGMENT.—The zamíndár of Sivaganga, on the 24th November 1879, executed and registered a lease of seventeen villages in the Eluvankotta taluk, being a part of his zamíndári, for a term of twenty years, reserving a rent of Rs. 18,000. At that time there were several suits pending against him, and in some decrees had been obtained and had not been satisfied.

On the 26th January 1881 the whole zamíndári was attached at the instance of a decree-holder in original suit 35 of 1879.

On the 9th February 1881 the zamíndár granted a perpetual lease of the before-mentioned villages in substitution of the former lease, reserving an annual rent of Rs. 12,000 only, the consideration was recited to be past services; but no evidence has been given of the existence of any necessity for a reduction of rent. Shortly after the making of this second lease, a receiver was appointed (with full powers under s. 503 of the Code of Civil Procedure); and he has brought suit to recover rent at the rate reserved under the first lease, and if the Court is of opinion that he is not entitled to receive it at that rate, then at the rate reserved by the second lease.

It appears that other decree-holders have taken out execution of their decrees, and are entitled to a rateable distribution with the decree-holder in original suit 35 of 1879 in respect of any sums realised in execution of his decree.

The appellants, the representatives of the lessee, do not deny

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GOPÁLASÁMI v. SANKARA.

that they are liable to pay the reduced rent, but they assert that rent cannot be recovered under the first lease. They rely on the language of s. 503, Civil Procedure Code, which declares that the receiver has the powers of the owner, and they argue that as the owner would be bound by the second lease, the receiver is also bound by it. We consider the Judge has rightly overruled this objection. The Procedure Code must be read as a whole and effect given as well to the provision which prohibits alienation after attachment to the prejudice of a decree-holder as to the provisions of s. 503. The second lease is void as against the decree-holder in original suit 35 of 1879, for it was an alienation, and was, moreover, distinctly prejudicial to the interest of the decree-holder, and it could not have been intended that the provisions of s. 503 should practically give validity to such an alienation in cases in which the Court might deem it necessary to appoint a receiver. In our judgment the provisions of s. 503 were intended to declare that the receiver in respect of all property which was or could be attached had the powers of the owner as they existed at the time the property was brought under the orders of the Court, provided that they have not ceased by operation of law.

The manifest result of the lease was to prevent and hinder not only the decree-holder in original suit 35 of 1879, but also all other persons who were then suing the zamíndár from obtaining satisfaction of their decrees, and it may be that on this ground the alienation might be avoided as against them; but we need not determine the point. The law which directs that the proceeds realized in execution shall be distributed will not prevent the decree-holder in original suit 35 of 1879 from insisting on the invalidity of the second lease, until his decree is satisfied.

The receiver cannot waive any right to recover what may be legally claimable without the sanction of the Court of which he is an officer.

The appeal fails and is dismissed with costs.

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APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

QUEEN-EMPRESS
against
CHENCHUGADU.*

1885.
April 30.

Penal Code, s. 286—Probable danger to human life—Loaded gun left in open place.

C having returned to his house after dawn from watching his crops at night with a loaded gun, and finding his house-door locked, placed the gun, loaded, with the hammer down on the cap, on a cot outside his house and went for a short time to a neighbouring house.

A, the child of a neighbour, four years old, was killed by the gun exploding.

C was convicted under s. 286 of the Penal Code for negligently omitting to take order with the gun sufficient to guard against probable danger to human life:

Held, that the conviction was bad in law.

THIS was a case referred to the High Court under s. 438 of the Code of Criminal Procedure by W. F. Grahame, Sessions Judge of Cuddapah.

The case was stated as follows:—

"I am of opinion that the conviction is improper and the sentence illegal. The accused had been watching his crops with a loaded gun on the night of the 1st January. He returned home after dawn. He found his house fastened up. He placed the gun on a cot standing in the open air near his house and went away on some business. The gun was loaded and capped and the hammer was, apparently, down on the cap instead of being on half-cock. During the absence of the accused, Akki, the daughter of a neighbour, a child four years old, came to the cot and would seem to have played with the gun. At any rate the gun went off and killed the child.

"The Second-class Magistrate convicted defendant under s. 286 of the Indian Penal Code 'for his negligent conduct in omitting to take such order with his loaded gun as is sufficient to guard against any probable danger to human life.' The sentence was

* Criminal Revision Case 174 of 1885.

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Rs. 25 fine or thirty days' rigorous imprisonment. The case did not come to my notice till too late to interfere with the imprisonment if undergone.

"I am of opinion that the affair can only be looked on as a lamentable accident. It is possible that a man may with a sinister purpose leave a loaded gun where others may get at it, intending that their meddling with it may cause death. Had the accused in this case left his loaded gun on the cot with such intention, he might be liable to punishment, and, beyond doubt, would deserve punishment; but it would not be under s. 286 of the Indian Penal Code. The fact that there was no intention to bring about harm cannot bring the affair under s. 286. A gun, even if loaded, cannot, I think, be held to be an 'explosive substance,' such as is contemplated in the section. Taking this view of the wording of the section and of this affair, I have thought it my duty to submit the matter to the High Court."

Counsel were not instructed.

The Court (Brandt, J.) delivered the following

JUDGMENT:—If it were proved that a man "knowingly or negligently omitted to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life," he would be liable to conviction under s. 286, although he had no intention to cause such probable harm.

The word "knowingly" is evidently used here advisedly and the word "intentionally" advisedly not used.

Whatever distinction there may be between "knowingly or negligently" and "rashly or negligently"—and it must be assumed that the former is purposely used in this part of the section while "rashly" is used in the first clause—consciousness is involved in both, while intention is not.

I cannot do better than refer to the elucidation (in the case of *Nidamarti Nagabhushanam*) (1) of the terms culpable rashness and culpable negligence for which we are indebted to Holloway, J. If a person omit to take precautions in respect of explosives in his possession sufficient to guard against any probable danger to human life, being conscious of the probability of danger resulting from such omission, he "knowingly" does that which under this section renders him liable to punishment; and this is sufficient for

(1) 7 M. H. C. R., 119.

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the present purpose, without going on to consider whether something more is required to constitute rashness, or whether acting with such consciousness constitutes or includes rashness; if a person omits to take such precautions without such consciousness, he is liable, by reason of his negligence, if he "has not exercised the caution incumbent on him," and which, if he had exercised it, would have created in him the consciousness that his omission was likely to cause danger.

It appears to me, however, that this case may and should be disposed of on another ground—I will not say independently of the elements of knowledge or of negligence, for the probability of the result and the knowledge or consciousness of the probability cannot but be considered together—namely, that unless it is established that danger to human life was a probable consequence of the omission, the offence is not established. The facts found and admitted are that the accused coming home with his gun loaded and finding his house door locked, placed his gun on a cot outside the house with the hammer down on the nipple on which there was a cap, and went away for a short time to a neighbouring house. If the gun had been left at full cock the case might have been different; but there is no evidence that the hammer could be left at half cock, and the accused states that he put the hammer down on the cap for safety. There is no evidence that the gun in that position would go off easily, and it is not impossible that the child who played with it gave it a severe shock from letting it fall or otherwise, or indeed the child may have lifted the hammer and let it fall on the cap. It would no doubt have been more prudent not to have left the gun there, loaded and capped as it was, but the question is whether the accused can be held responsible for the result as a probable result; and this I think he cannot be. He might reasonably presume that a person unacquainted with the use of a gun and having no occasion to touch it would not touch it at all; that a person acquainted with the use of fire-arms would also not touch it, or that if he did so there would not be danger: and he might also reasonably presume that persons having the custody of children would exercise ordinary care in looking after them: and if reasonable caution is expected of the accused, so it must be expected of others also who are responsible for children unable to take care of

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themselves. The place where the cot was is described as open ground, but it is not stated that it was public ground; from its being close to the accused's house, it is as likely as not it was in his occupation. The mother of the child and the second witness, Papaiya, no doubt say that the children of the place used to play about on this ground, but the fourth witness, Gangi Reddi, simply describes it as ground across which persons had to pass in order to get to the accused's house: and the accused describes it as ground over which there is a short cut to his house from the house of the parents of the deceased child. It cannot, I think, be held that the accused must have known or ought to have considered it to be probable that a child or children would be likely to be playing about in this place and that it or they would be likely to handle or play with the gun, and that the danger which actually occurred was not such a probable danger as that he can be held responsible under s. 286. On this ground I think the conviction bad in law and do annul the same and direct that the fine, if levied, be refunded.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1885. April 16, 27.

ÁDIMULAM (DEFENDANT No. 1), APPELLANT,

and

PÍR RAVUTHAN AND ANOTHER (DEFENDANT No. 2 AND PLAINTIFF), RESPONDENTS.*

1 Mad. 166.
2 Bom. 895.
24 Mad. 251.
31 All. 514 (Dissented)

Landlord and tenant—Tenant on sufferance—Limitation Act, 1877, *sch. II, arts.* 139, 140.

Although the English rule of law as to the nature of the possession of a tenant for a term of years, who holds over, has been adopted in British India, the rule of limitation prescribed by 3 & 4 Will. IV, c. 27, by which time begins to run against the landlord from the date of his right of entry, has not been adopted in the Indian Limitation Act, 1877.

If a tenant for years holds over in British India, time does not begin to run against the landlord until the tenancy on sufferance has been determined.

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* Second Appeal 162 of 1885.

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ÁDIMULAM v. PÍR RAVUTHAN.

This was an appeal from the decree of C. Rámáchandráyyar, Subordinate Judge of Madura (East), reversing the decree of Venkata Rangáyyar, District Múnsif of Madura, in suit No. 566 of 1882.

Abdul Rahiman Ravuthan sued Ádimulam Pillai and Pír Ravuthan for possession of a house sold by defendant No. 1 to plaintiff in April 1881, and for rent from that date, or for repayment of Rs. 800, purchase money, with interest by defendant No. 1.

The District Múnsif decreed delivery of the house and payment of rent by defendant No. 2.

On appeal by defendant No. 2, plaintiff and defendant No. 1 being made respondents to the appeal, the Subordinate Judge reversing this decree, decreed payment of Rs. 800 and interest by defendant No. 1 to the plaintiff.

Against this decree, defendant No. 1 appealed, making plaintiff and defendant No. 2 respondents to the appeal.

The facts necessary for the purpose of this appeal are stated in the judgment of the Court (Turner, C.J., and Hutchins, J).

Srinivasa Ráu for appellant.

Bháshyam Ayyangár for respondents.

The tenancy was for a term of seven years, which expired in 1863, and therefore the tenancy expired in 1863, Transfer of Property Act, 1882, s. III(*a*). Limitation began to run from that time under art. 139 of the Limitation Act, schedule II. Art. 140 excepts landlords from reversioners, as their case has already been provided for. The holding over is that of a wrong doer, for it is not alleged or found that any rent was received since 1863, or that assent was otherwise given to the tenant's continuing in possession since 1863—(Transfer of Property Act, s. 116).

The relation of landlord and tenant, which was determined by effluxion of time in 1863, was, therefore, not renewed, and hence the limitation began from 1863.

Of course if a new lease by implication from year to year commenced after 1863, limitation could only begin to run from the determination of such lease.

Judgment.—In this case the plaintiff in April 1881 purchased a house from defendant No. 1 for Rs. 800: the house was in the occupation of defendant No. 2, who denied the title of defendant

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ADIMULAM v. PYA RAVUTHAN.

No. 1. The plaintiff brought this suit to obtain possession of the house and mesne profits, or for the recovery of his purchase-money. It is asserted that in a suit brought by one Gurusámi against defendant No. 2 the latter entered into a compromise whereby it was agreed that he should hold the house as Gurusámi's tenant and surrender it to him on the expiry of seven years, which expired in 1863. Defendant No. 1 alleged that Gurusámi was a mere name-lender for him and assigned the house to him in 1863.

The Appellate Court dismissed the claim for possession, but decreed that the plaintiff should recover the purchase-money and interest from defendant No. 1. Defendant No. 1 has appealed. He contends that defendant No. 2 cannot deny his title or that of Gurusámi under whom he claims, and that the plaintiff is not entitled to recover the purchase money.

As to the payment of the purchase-money, the plaintiff is entitled to its return if the consideration wholly failed. But has the consideration wholly failed? The appellant asserts it has not, and although the Appellate Court held that, in the absence of a written document, the evidence that Gurusámi was the benámi purchaser for the plaintiff was not satisfactory, it has not decided whether or not the deed of assignment produced by the plaintiff with his application for review was genuine, as it considered the evidence would be immaterial, inasmuch as there had been adverse possession by defendant No. 2 from the date when the term created by the compromise expired.

The appellant maintains that the possession of defendant No. 2 was not adverse, that he held for a term, and on the expiry of the term remained in possession in the same character, and that his tenancy was permissive.

Where a person who has been let into or allowed to remain in possession as a tenant for a term of years holds over, he becomes a tenant by sufferance. The possession of a tenant by sufferance is not adverse to the landlord, and under the English law, until the passing of the Limitation Act, 3 & 4 Will. IV, c. 27, limitation would not have begun to run against the landlord until the tenancy had determined. It might be determined by the act of the landlord, who by assent might convert it into a tenancy at will or by dissent make the continuance in possession tortious. Or it might

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be determined without the landlord's intervention by the transference of possession to a third party; for having no title the tenant on sufferance could convey none. For the same reason, if a tenant by sufferance dies and his representative enters and holds on, he holds as a trespasser.

The Statute 3 & 4 Will. IV, c. 27, effected however a change in the Law of Limitation and debarred the landlord, who was entitled to the reversion on the expiry of the term, from maintaining suit unless he instituted proceedings within twenty years from the date when the right to enter accrued to him. The English rule of law as to the nature of the possession of a tenant who holds over after the expiry of a term has been adopted in this country; but the Indian Law of Limitation differs essentially from that of the present English Law with respect to such tenancies. By Article 139, Act XV of 1877, the landlord has a right to sue to recover possession from a tenant any time within twelve years from the determination of the tenancy. It is for the person who resists the right to show that the tenancy has determined. All that is shown in this case is that the tenancy for the term has determined; for aught that appears, the tenancy by sufferance subsisted up to the date of suit.

That the Legislature intended this result is indicated by the following article, which provides that the twelve years allowed for a suit to a remainder-man or reversioner (*other than a landlord*) shall run from the date when his estate falls into possession. We shall set aside the decree and direct a rehearing of the appeal, when the Appellate Court may admit the alleged assignment if it is satisfied that there are sufficient grounds for so doing. The costs of this appeal will abide and follow the result.

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APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

1885.
May 20.

QUEEN-EMPRESS

against

LALLA AND OTHERS.*

Act I of 1866 (*Madras*)—*Cantonment Rules, ch. IV, s.* 16—*Failure to report small-pox, not punishable.*

Failure by a householder to report a case of small-pox in his house, as directed by s. 16 of ch. IV of the Cantonment Act Rules, is not punishable under Madras Act I of 1866.

THIS case, with two others of a similar nature, was referred to the High Court under s. 438 of the Code of Criminal Procedure by H. St. A. Goodrich, District Magistrate of Chingleput.

The facts were stated as follows:—

"The accused were charged with having failed to report an attack of small-pox on the inmates in their respective houses, and convicted under s. 16, ch. IV, Cantonment Rules, framed under s. 19, Military Cantonment Act, I of 1866.

"It would appear that no provision for punishment of breaches of the rules contained in this chapter exists, though breaches of the rules contained in the third, fifth, and sixth chapters are made punishable. The punishments awarded seem to have no legal sanction, and the cases are submitted for the orders of the Honorable High Court."

Counsel were not instructed.

The Court (Brandt, J.) delivered the following

JUDGMENT:—The District Magistrate appears to be right.

Chapter III, s. 1 of the Cantonment Rules, renders liable to the penalties provided in cl. XI, s. 19 of Act I of 1866 (Madras), any person who, within cantonment limits, shall commit a breach of any of the rules and regulations *contained in that chapter*, but

* Criminal Revision Cases 236, 237, and 238 of 1885.

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ch. IV, which appears to be directory only, and to be principally, indeed almost entirely, concerned with the duties of the Cantonment Magistrate, contains no such provision. No penalty, apparently, attaches to failure on the part of a private individual to report to the Cantonment Magistrate the appearance of an epidemic or contagious disease. The convictions must be, and they are, quashed, and the fines will be refunded.

QUEEN EMPRESS *v.* LALLA.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

WILSON

against

THE PRESIDENT OF THE MUNICIPAL COMMISSION, MADRÁS.*

1885. March 2.

City of Madras Municipal Acts (V of 1878 *and I of* 1884), *ss.* 103, 105, *sch. A, class I.*

Although the tax levied on professions under s. 103 of the City of Madras Municipal Act, 1878, is described as a yearly tax, a half-yearly liability is incurred in respect thereof by the tax-payer.

W having been assessed under class I, schedule A of Act V of 1878, Madras, to profession tax at the yearly rate of Rs. 150, paid a moiety thereof for the first half of the year 1884 as provided in s. 105 of the said Act. When the tax for the second half-year became due, Madras Act I of 1884 had come into force and W was assessed for the second half of the year under class I of schedule A of that Act at Rs. 125, being a moiety of the yearly tax on the same class:

Held, that the assessment was legal.

THIS was a case stated and referred for the decision of the High Court by W. M. Scharlieb and T. V. Ponnusámi Pillai, Presidency Magistrates of Madras, under s. 193 of the City of Madras Municipal Act (No. I of 1884), at the request of the President of the Municipal Commission of the Town of Madras.

The case was stated in the following judgment :—

"Mr. C. W. Wilson, practising as an Attorney and Solicitor in Madras, appeals to this Court under s. 192 of the new Madras Municipal Act I of 1884 from the decision of the President of the

* Referred Case 1 of 1885.

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WILSON v. PRESIDENT, MUNICIPAL COMMISSION, MADRAS.

Madras Municipality, passed under s. 190, taxing him with the sum of Rs. 125 for the *second* half of the year 1884 under class I, schedule A; whereas he had been assessed at the beginning of the year under the former Act V of 1878 then in force under the same class with the sum of Rs. 150 for the whole year and had paid the moiety thereof, viz., Rs. 75, for the first half of the year. The new Act I of 1884 came into force on the 20th March of that year; and the tax for the year, in the class in which Mr. Wilson is placed, has been raised from Rs. 150 under schedule A, class I of the former Act for practising Barristers, Attorneys, &c., to Rs. 250 for such professional gentlemen under schedule A, class I of the new Act. The facts in this case are all admitted.

"Mr. *Shephard,* for Mr. Wilson, contends that the profession tax, provided for by s. 103 of the former and present Acts, is a tax that is assessed for the year, and by s. 105 is made payable in *two equal moieties*, one for each half of the year; and that having been assessed for the year under Act V of 1878 then in force, and having actually paid one moiety thereof, Mr. Wilson could not afterwards be taxed under a new Act for the second half-year and be made to pay the moiety of an enhanced tax. In support of this contention, Mr. *Shephard* refers to the schedule itself, which is clearly made for the year and assesses the individual for the year, whereas schedules B and C, which relate to the taxes payable on vehicles and animals, are expressly made to provide for such taxation half yearly. The basis of the contention that the President of the Municipality had no right to introduce a new tax for the second half-year under a new Act is that s. 2 of this new Act, in repealing the former Act, expressly kept it alive so far as it related to any tax already assessed under it, that is, before the coming into operation of the new Act; and that, as a matter of fact, Mr. Wilson had been assessed his profession tax at Rs. 150 for the year 1884 before the new Act came into operation.

"Mr. *Grant*, for the President of the Municipality, contends, firstly, that Mr. Wilson has no right to appeal, because, if he preferred his appeal under the former Act, that Act had been swept away, and if he appealed under the new Act, he had no ground of appeal, because the tax imposed upon him was the right tax under the new Act; secondly, Mr. *Grant* contends that the word *assess*, or *assessment*, is not applicable to the levy of tax on

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professions or salaries, but is, on the contrary, systematically used in respect only to taxes for water and lighting, and to taxes on animals and vehicles; that even if the word *assess* did apply to profession taxation, the assessment was a half-yearly operation; because, under s. 105, the person to be taxed becomes liable to pay each half-year's tax only after the exercise of his profession for sixty days from the beginning of each half-year; and that, under s. 104, cl. 2, the President had power to revise his classification from time to time.

"As to the first objection that Mr. Wilson has no right of appeal, we find that he files his appeal under s. 192 of the new Act I of 1884. That section gives him the right to appeal to two Magistrates from any decision of the President of the Municipality passed under s. 190; and under that section the President had decided that Mr. Wilson was to pay for the second half of 1884 the moiety of Rs. 250 prescribed by the new Act I of 1884. Mr. Wilson contends that the President of the Municipality had no right to do this, as, under s. 2 of the new Act, the tax with which he had already been assessed for the year under the repealed Act was the tax to govern the year. In effect Mr. Wilson says, "you have no right to tax me under s. 190 of the new Act, because s. 2 of that Act keeps the old Act alive for me so far as my profession tax for the year 1884 is concerned." We hold, in respect to this contention, that Mr. Wilson has clearly a right of appeal.

"As to the second objection that the term *assess*, or *assessment*, does not apply to taxes on professions and salaries, we find that, as a matter of fact, the term *assess* is actually used in schedule A, both in the former as well as in the present Act, wherein the rates of such taxes are fixed and determined. *Vide* classes II, III, &c., where, after the words "practising Barristers, Attorneys," &c., the words "not assessed under class I" or class II, or class III, as the case may be, follow. Moreover, in s. 118, both of the old and new Act, the word *assessment* is not only used in relation to taxes on professions, trades, and calling, but is also used in relation to taxes on fixed salaries and incomes even. We cannot understand on what ground it can be said that the term *assess*, or *assessment*, is inapplicable to the tax on professions. To us the term conveys the idea of a previous estimate or calculation on which the tax is rated or fixed; and if that be so, as we believe it is, then we agree

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with Mr. *Shephard* that the term is peculiarly applicable to the profession tax, because the earnings of professional men are not fixed and invariable, but vary from time to time according to circumstances and the amount of business coming in to them.

"The last argument taken is that, even if the term *assess* were to apply, the President had power to assess half yearly, because the tax is payable half yearly, and s. 104 empowers the President to revise his classification from time to time. There is no doubt that the President has power to revise a man's classification. For instance, he might, on further and fuller information placed before him, find that the man ought to be placed in the first and not in the second or third class, and *vice versâ;* and he can accordingly remove a man from one class to another. But that is not the present case. Here it is not a case of revising at all, or reclassifying a man. It is keeping him in the same class, but substituting for the second half of the year under a new Act a tax of a different amount, in place of that with which he had been assessed in the same year and the moiety of which he had already paid for the first half. There would be no alternative to doing so if the new Act had absolutely repealed the former Act and had simply substituted itself in its place. Instead of doing so, it keeps the former Act alive for certain purposes until the close of the year; for s. 2 in repealing the former Act V of 1878 repeals it, among other things, "except as to any tax *assessed* before this Act comes into operation." Thus, the whole question comes to this—was Mr. Wilson's profession tax assessed for the year 1884 before the new Act came into operation; and was it assessed for the year, or only the half-year?

"To answer this question, we must first look at the terms of s. 103, both of the former and present Act, by which the obligation to pay the profession tax is created. We find that the words used are these:—'If the Commissioners determine to levy a tax on arts, professions, trades, and callings, *every person*, who within the city exercises any one or more of the arts, professions, trades, and callings specified in schedule A, *shall pay*, in respect thereof, *the sum specified in the said schedule as payable* by persons of the class in which such person is placed.' The profession tax payer is thus called upon to pay—what? the sum specified in the schedule A, as payable by persons of the class in which he is placed.

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"If we turn to schedule A, we find that the profession tax payers are divided into classes from I to VII; that certain specified amounts are set down as payable by each such class; and that those amounts are payable 'yearly'—not half-yearly as in the case of taxes on vehicles and animals (schedules B and C). Taking s. 103 and schedule A together, it follows, that when the section commands that the tax-payer shall pay the amount specified in the schedule, such tax-payer must pay the amount which the schedule specifies he shall pay '*yearly*.' The question then arises, how comes it then that, as a matter of practice, the tax-payer pays his profession tax by two instalments—one half for each half year? This comes about by the operation of s. 105, which provides that 'the sums payable under s. 103 shall be paid in *two equal moieties*, one for each half of the year.' The very terms used in s. 105 denote that the tax payable under s. 103 is a yearly tax; for those terms provide that such tax shall be paid in *two equal moieties*, one for each half year. The conclusion is inevitable that the tax payable is a yearly tax; but that the municipality have no right to demand it of the tax-payer, except in two equal instalments after two months of each half year have expired. And this provision has doubtless been made out of pure consideration for the professional man, to protect him from the possible hardship of being forced to meet the entire demand by one payment at one time.

"It is admitted that Mr. Wilson was required to pay, and did pay, Rs. 75 for the first half of 1884. He was thus placed in the first class of schedule A of the former Act V of 1878 then in force, and must necessarily, therefore, have been *assessed* for the year 1884 under that Act; and if *assessed* under that Act, such assessment was kept alive until the end of the year 1884 by the operation of s. 2 of the new Act, and he could not be called upon to pay more than Rs. 75 for the second half of that year. To call upon him to pay Rs. 125 for the second half of the year is entirely out of keeping with the terms of s. 105, which require that the year's tax should be paid in two equal moieties; and, certainly, Rs. 75 and Rs. 125 cannot by any possible process be regarded as equal moieties. As Mr. *Shephard* observed, the object of the Legislature is to preserve the continuity of things; and when the Legislature passed a new enactment, the Legislature, no doubt, intended

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that it should be applied, so far as it could be applied, without disturbing things already set on foot; and thus we find that s. 2 of the new Act repeals the former Act, except for things already done or proceedings already taken under it.

"Such being our view of the question before us, we hold that the President of the Municipality was not well-founded in deciding that Mr. Wilson was obliged, under the new Act, to pay Rs. 125 as the half tax of his class for the second half of 1884; and we accordingly direct that the difference between that amount and the half tax of Rs. 75 properly chargeable to him for the second half of 1884, viz., Rs. 50, be refunded to him."

Mr. *Shephard* for Mr. Wilson.

Mr. *Grant* for the Municipality.

The Court (Turner, C.J., and Brandt, J.) delivered the following judgments:—

TURNER, C.J.—The facts of this case are as follow:—Act V of 1878 (Madras) s. 101, empowered the Municipal Commissioners for the City of Madras, with the approval of the Governor in Council, to raise funds for the purposes of the Act from all or any one of the sources mentioned in the preceding section, including, among others, a tax on professions, trades, and callings.

Section 103 provided that, if the Commissioners determined to levy a tax on professions and callings, any person, who exercised within the city any profession or calling, should pay in respect thereof the sum specified in the schedule as payable by persons of the class in which such person might be placed.

The schedule referred to specified certain sums as payable yearly by persons placed in several classes as liable to the tax on professions and callings.

The 105th section of the Act declared that the sums payable under s. 103 should be paid in equal moieties, one for each half of the year; but that the moiety payable in respect of each half-year should be payable only after the person liable to pay it had for sixty days in such half-year exercised such profession or calling. Although then the Commissioners were empowered to levy a yearly tax, and its payment was prescribed in equal moieties, the liability of the tax-payer was distinctly limited to each half-year; and by ss. 106, 189, and 190 a person, who had omitted to pay the tax, and been served with a notice requiring him to pay it, might, in

any half-year within a time specified, complain or apply for the revision of the classification or tax.

The Act did not prescribe that the approval of Government, required by s. 101 as a condition of the exercise of the power of taxation by the Commissioners, should be sought or obtained in any particular form or any particular seasons.

In order to secure to the Government some control over municipal expenditure, the 85th and following sections prescribed that budgets should be submitted annually to the Governor in Council containing an estimate of the available municipal income, and an estimate of expenditure as approved by the Commissioners.

While the Act intended that the Municipal Commissioners should submit a budget in anticipation of sanction yearly, it also empowered them to submit, at any time, a supplemental budget which might contain apparently whatever might have been contained in the original budget and might have been dealt with by the Governor in Council in like manner as the original budget.

When Act I of 1884 (Madras) came into force, proposals had been submitted and sanctioned in accordance with the provisions of Act V of 1878, and under s. 2 of Act I of 1884 the taxes so sanctioned and imposed might clearly have been collected as imposed and assessed under Act V of 1878. But by Act I of 1884 the Commissioners had like power as under Act V of 1878 to send in a supplemental budget, and a proposal for taxation was submitted and was sanctioned when the Act I of 1884 had come into force.

That Act authorized collection of a higher tax on professions, trades, arts and callings than under the former Act, and it is difficult to see how it can be contended that the Commissioners had not power to propose, and Government to sanction, collection of the tax up to the limit allowed by law at the time the proposal was made.

Let us assume that the Commissioners had made no proposal in their budget for 1884 (which budget should have been submitted before the close of 1883) for collection of the tax on arts, trades, and professions; could it be said that the Commissioners might not by a supplemental budget have, in May 1884, proposed the collection of the tax also in addition to the taxes proposed by them in the original budget? Clearly they could: and if they could, they undoubtedly might do so up to the limit allowed by the law then in force.

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And this appears to be an answer to the argument founded on the provision in the Act of 1878 and in the corresponding section (105) of the Act of 1884 that payment of the professional tax is to be made "in two equal moieties, one for each half of the year;" that although the tax is described as yearly tax, the tax-payer incurs only a half-yearly liability. If he does not carry on his profession in the first half of the year, he is liable to pay the tax only for the second half-year. If, having carried on his profession during the first half-year, he ceases to do so, he cannot be charged with the tax for the second half-year. Moreover, if the tax had been originally proposed in a supplemental budget, although Government might possibly have sanctioned its imposition for the whole year, it obviously would have been more fair for the tax-payers that Government should have sanctioned it only for the half-year which was about to commence.

If originally the Municipal Commissioners had proposed and Government had sanctioned a rate on houses at half the maximum rate allowed under the Act, they might respectively have proposed and sanctioned the collection of the whole rates for the second half-year.

The provisions relating to supplemental budgets are not limited to any particular time; the Municipal Commissioners appear to have been left unfettered in this respect in order to enable them to meet any emergency occasioned either by a failure in an anticipated source of income or an unexpected expenditure. The order of Government, dated the 9th January 1884, passed upon the budget for 1884, contemplated the allowance of the Act which received the sanction of the Governor in Council the day on which the order was passed, and suggested the submission of a supplemental budget in order to give the Municipal Commissioners the benefit of the new tax which the new law proposed to allow. In admitting a proposal to collect the professional tax at the higher rate allowed by the amending Act the Commissioners acted on this suggestion and the Government accorded the necessary sanction.

The Magistrates' order directing the refund to Mr. Wilson of the difference between the sum claimed under the Act of 1884 for the second half-year and the sum which would have been payable under the Act of 1878 for that half-year if the latter Act had remained in force must then be set aside.

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Although we have no discretion to deal with the question of costs, I think we are justified in expressing an opinion to the effect that the case being one of considerable public importance, and the question of law involved being by no means easy of disposal, an order directing each party to bear their own respective costs would probably not be improper.

BRANDT, J.—I agreed in the conclusion arrived at by the learned Chief Justice and in the observations as to the costs in these proceedings, but I should have preferred to deliver a written judgment, and wish to record the reasons which lead me to conclude that the view taken by the Magistrates making the reference is not in my opinion correct.

It appears from the Municipal Acts under consideration that the Legislature intended that a budget for the ensuing year, "containing an estimate of the available municipal income, an estimate of expenditure as approved by the Commissioners; and proposals as to the amount of taxes necessary to be levied .... for the purpose of meeting such expenditure in the next ensuing year of municipal taxation," should be submitted to Government in sufficient time to allow the Governor in Council to consider it and to "pass, reject or modify all or any of the items" entered in it "or to add thereto any items" before the commencement of the year for which the budget was prepared.

A budget for 1884 was submitted before the close of 1883 and was approved generally, and the levy during the year 1884 of the taxes proposed was sanctioned, but provisionally only, as it would appear, with reference to the probability of the new Act (I of 1884), which had received the assent of the Governor in Council, taking effect during the year; at all events the Government expressed a wish or directed that "a supplemental budget be submitted when the new Act takes effect" (see order of the Government of Madras, dated 9th January 1884, No. 41, Financial Department).

It is not necessary to consider the result if the Commissioners had decided not to submit a supplemental budget, for, on the 21st May 1884, they proposed to levy during the then current year taxes similar to those already sanctioned in the budget, but at the rates and under the authority of the Act of 1884 which had by that time become law, and on the 4th June 1884 Government sanctioned under s. 99 of Act I of 1884 the levy of the taxes

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proposed by the Commissioners (see notification in the *Fort Saint George Gazette* of the 10th June 1884, p. 356).

To support the conclusion arrived at by the Magistrates, it must be shown that the Governor in Council had no power to sanction the levy of, and the Municipal Commissioners no power with such sanction to levy, the tax taken from Mr. Wilson for, and in respect of, the second half-year of 1884.

The budget for 1884 passed under the Act of 1878 remained, under the provisions of s. 2 of Act I of 1884, the budget for the year 1884, but the latter Act authorized the levy of taxes at the rates specified in the schedules appended to it; and under s. 99 of the Act it was open to the Commissioners "with the approval of Government" (which they obtained) "to raise the funds required for the purposes of the Act from all or any of the sources specified in s. 98" at rates not exceeding those set out in the schedules; and it cannot, in my opinion, be held that the levy of the taxes authorized under the Act of 1884 is illegal by reason of the proposals of the Commissioners to levy, for the remainder of the year or for the second half of the year 1884, taxes already sanctioned for the year, but at the rates authorized under Act I of 1884, not having been submitted in the precise form of a supplemental budget (if this was so in fact); or by reason of the sanction of Government to those proposals not having been accorded in terms as sanction in respect of a supplemental budget. It can make no practical difference if instead of re-printing the whole original budget, the only alteration made being entries of the higher rates allowed in some cases in the schedules to the Act of 1884, the Commissioners asked for the sanction in the form of a proposal to levy the taxes, and the Government sanctioned the levy thereof, under the new Act, the estimated receipts and expenditure remaining in other respects the same as before.

As to the argument that the profession tax is a yearly tax, assessed once for all and payable in two equal moieties, and that on this account it was not legal for the Commissioners to charge Mr. Wilson the rate payable by persons placed in class I in schedule A referred to in s. 103 of the Act of 1884, it appears to me to present little or no difficulty.

As observed by the learned Chief Justice the profession tax is a yearly tax, but with a half-yearly liability.

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Mr. Wilson was no doubt placed for the year 1884, once for all, in class I in schedule A under the Act of 1878, and (putting aside all consideration of revision of classification, for he is placed in the same class under the Act of 1884) had the Act of 1878 remained in force and had he exercised his profession during the second half-year for the period specified in s. 105, he would have been liable to pay for the second half-year of 1884 a sum equal in amount to that paid by him for the first half-year: but Act I of 1884 became law before the second half commenced, and under it gentlemen placed in the class in which he was placed for the year were chargeable at a higher rate; and it appears to me that the intention of ss. 103 and 105 of the two Acts is fully carried out, so far as the interests of the tax-payer are concerned, in this manner: Mr. A is making and is classed as making 1,000 rupees a month at the beginning of 1884: before the end of the first half-year he is making 5,000 rupees a month, but he is classed for the whole year, and the tax assessable or assessed on him is so much; without revision of classification at all events he cannot be called on to pay more during the second half-year, and it is extremely doubtful if such revision could be made, if indeed not clear that it could not; but the President and Commissioners might certainly, if they saw reason, revise the classification in favor of Mr. A, if he could show at the beginning of the second half-year that his income had fallen to Rs. 100 a month; in which case the sum payable by him during the second half-year would not be a "moiety" equal to the sum paid by him for the first half-year, so that the mere fact that the two sums happen not to be "equal moieties" in the case before us cannot determine the question: by parity of reasoning it might be argued that professional tax could not be collected for the second half of a year from any one who had not been assessed for the whole year, because he had not paid any "moiety" for the first half-year.

The Acts did not perhaps contemplate a case precisely similar to that before us, but it cannot on that account be held that the collection of the tax authorized by the law in force when it was collected was illegal.

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19 Bom. 457

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1885. March, 30.

VI'RASANGAPPA (PLAINTIFF), APPELLANT,

and

RUDRAPPA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindú Law—Lingáits—Marriage—Desertion of wife—Re-marriage of wife valid.

According to custom obtaining among the Lingáits of South Canara, the re-marriage of a wife deserted by her husband is valid.

THIS was an appeal from the decree of C. Venkoba Ráu, Subordinate Judge of South Canara, in suit 33 of 1883.

The plaintiff, Vírasangappa Shetti, sued the defendants, Bangalore Rudrappa Shetti and Kusava, a minor, to recover a portion of the estate of his maternal grandfather, valued at Rs. 11,500 in the possession of the defendants.

The plaintiff alleged that his maternal grandfather's estate was inherited by his three daughters—Kusava, Malakama, and Doddava (plaintiff's mother). That Kusava, who survived her sisters, died in 1877, after having made over the greater portion of the land belonging to the estate to plaintiff. That the property now sued for was in the possession of Nanjamma, daughter of Malakama, till her death in 1883, having been allowed to her and to her daughter Rudrava, since deceased, for maintenance.

That Nanjamma married plaintiff's father after the death of Doddava, and Rudrava was the issue of the marriage. That Kusava, defendant No. 2, was the illegitimate daughter of Rudrava, and defendant No. 1 was her putative father.

Plaintiff as daughter's son claimed to be entitled to the property in preference to defendant No. 2.

Defendant No. 1 pleaded that plaintiff had no right to the property, it having been assigned to Nanjamma and Rudrava

* Appeal 112 of 1884.

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absolutely in 1860 by a family partition deed. That Nanjamma and Rudrava having died, Kusava was the sole heir to the property.

That Kusava was the legitimate daughter of Rudrava and himself, born in lawful wedlock, according to the custom of the caste (Lingáits).

That although Rudrava, prior to her marriage with himself, had been betrothed to one Kottúr Rudrappa, that marriage had not been consummated, Kottúr Rudrappa having disappeared for twenty years.

The Subordinate Judge found that in 1860 the property sued for was assigned absolutely to Nanjamma and Rudrava and their descendants, and not for maintenance only. Upon the other issues raised in the suit the material portion of his judgment was as follows:—

"The third, fourth, and fifth issues have to be considered together. These raise the questions as to the legitimacy of defendant No. 2, and as to her right to retain the properties in question as against plaintiff. The decision of the first question involves the consideration of the subordinate questions (1) whether defendant No. 1 married the late Rudrava, (2) whether the said marriage was legalised by the custom of the caste to which the parties belong. It is clear that Rudrava was betrothed to Kottúr Rudrappa, and though there was no consummation of marriage between them, yet, for all legal intents and purposes, he was her husband. This marriage took place eighteen years ago when Rudrava was about twelve or thirteen years old. The husband of this marriage is alive. Plaintiff's vakil's contention is that, assuming defendant No. 1 went through a form of marriage with Rudrava, it was in fact no marriage, and that defendant No. 2, the issue of that marriage, is illegitimate, being the fruit of an adulterous intercourse. It is admitted that among Lingáits widow marriage prevails, but it is said to be confined to lower orders. Defendant's contention is that the second marriage of a wife forsaken by the first husband is allowed among Lingáits; that such a marriage is known as Sérai Údiki* as distinguished from the Lagna or Dhara the first marriage; that defendant No. 1 was married to Rudrava in the Sérai Údiki form; that plaintiff and all the members of the

* Giving a cloth.

family and the caste recognised the marriage; and that defendant No. 2 is therefore legitimate and is entitled to the plaint properties in preference to plaintiff. In order to arrive at a conclusion on the several points which are involved in the consideration of these questions, it seems necessary first to see whether the custom contended for is made out. The *onus* of showing the existence of the custom is on defendants. According to law and the decisions, the usage asserted must be established by 'clear and unambiguous evidence, and it must be shown that it is exercised in pursuance of a custom understood to have the force of law, and not to be a merely repeated violation of law'—*Vishnu* v. *Krishnan*.(1) Plaintiff says in his deposition before the District Court that Sérai Údiki is a widow re-marriage; his seventh witness, Sivappaya, describes it as a re-marriage of a wife deserted by the husband, and the ceremony consists in tying a tálí, and giving a new cloth to the woman. This is exactly the description which has been given by the defendant's side. Defendant's first witness is the head of a Lingáit mutt: he deposes to the custom; to the marriage of defendant No. 1 with Rudrava in accordance with that custom; to his knowledge of other instances in the cases of defendant's second witness Rudraya and Nanjanna of Ullál. Second witness, Rudraya, says he has married Puttani in Sérai Údiki form. This Puttani was first married to Siddhaya, and, after his abandonment of her, she married second witness and has children by him. He and his wife and children live in a mutt and mix with society. This man's instance is a well-authenticated one. His children were initiated in the religious order by a swámi of the Lingáit class in the same way as children of Dhara or regular marriages. He also proves Nanjanna's Sérai Údiki marriage with sister of Basavappa. His brother attended the marriage. Nanjanna's Sérai Údiki marriage is also confirmed by the testimony of plaintiff's ninth witness, who says that the children of Nanjanna, born of such marriage, are received in society and in mutts and are allowed to mess with the members of the caste. Third witness is also the head of a mutt, and gives more instances of the re-marriage of widows than of wives. His knowledge is partly derived from hearsay and partly from the couple living together

(1) I.L.R., 7 Mad., 10.

as husband and wife. In matters of this kind hearsay evidence like tradition may, I think, be received. Direct evidence of such marriages is not always possible, and one of the ways in which they may be proved is from the manner of their living and from the way in which they are treated by the neighbours. Fourth witness married a widow in Sérai Údiki form. Fifth witness deposes to first defendant's Sérai Údiki marriage with Rudrava and to the prevalence of custom in caste. Sixth witness deposes to the custom and gives an instance in his own family of a wife deserted marrying again in the lifetime of her husband. He knew her desertion by her first husband, and he heard of her Sérai Údiki from his brother-in-law.

"From the testimony on plaintiff's side, it appears that widow and wife re-marriages are put on the same footing, and that among the lower orders the practice of Sérai Údiki marriage does obtain. Almost all the plaintiff's witnesses who are Lingáits, admit the prevalence of the custom of wife and widow re-marriages, but qualify their evidence by saying that it does not take place in their caste or in that of Melpavada or Dhulpavada, to which caste or sub-division plaintiff belongs.

"The Lingáits are declared by the Bombay High Court to be Súdras.(1) This class is probably more numerous in the Bombay Presidency than in this district, where the Lingáit population is comparatively small. It numbered 708 in the census of 1871. In the recent census the figure does not appear separately, as it seems the class has been put under the head of Sivites. It may be that in this class, as elsewhere, there exists among Súdras various sub-divisions of the caste, but what those sub-divisions are—which is higher and which is lower, and in which class the custom does or does not prevail—are not clearly shown. One witness says plaintiff belongs to Banijiga caste, another says he is a Melpavada, and a third says he is a Dhulpavada. It appears, however, that Ayyáchári class is superior to these classes, being a purohit or priestly class; yet in this class we find widow marriages to be of frequent occurrence: and we also find that in the Banijiga class, a wife re-marriage has taken place. Puttani's father is a Banijiga, and her re-marriage with Rudranna, which is a living instance,

(1) See Wilson's Glossary—Lingáit.

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shows that in the caste or class to which plaintiff belongs this custom prevails. In respect to the vague statements of witnesses that the custom prevails only in the lower classes, and not in the higher, they should be received with caution, seeing that some of them were unwilling to speak to instances in higher classes to which their attention was directed, and in which either they took part or which, in the ordinary course of things, have come to their knowledge.

"According to the theory of the founder, Básava, of this sect, caste distinctions were unworthy of acceptance, and, therefore, he abolished caste and other Bráhmanical observances. A man of low birth may become a Lingáit as well as the highest caste Bráhman. Bráhmans who have joined this sect are termed Árádhayas. (These abound in Northern Circars.) They do not discard the sacred thread and are consequently looked upon by ordinary Jangams, who have foresworn caste, as idolaters—(Dr. Cornish' Census Report, 1871). He also describes what is Jangam, Lingam, and Stanara Lingam. In Mr. MacIver's report in the census of 1881 he says that the question of status among Súdras is hopeless; and he adds that the test of social pre-eminence as a guide to grading the castes is impracticable.

"The custom alleged may doubtless be at variance with the general Hindú law. If the deviation from the general law has not been received with repugnance, and if it found favor with the classes affected by its operation, I cannot see why it should not be received as a usage recognised by the community among whom it prevails: the usage accepted by the community and acted upon may become a valid custom. No written law has been referred to in this case as governing the customs of this class; but the instances shown in the evidence and the consciousness of the people seem to prove the existence in the class of the custom of wife re-marriage in the case of desertion by the first husband. It is alleged that the evidence to prove custom is insufficient. From the very nature of things, wife re-marriages must of necessity be fewer than widow marriages. Both are exceptions to the general rule, and if one is common and the other rare, it does not necessarily go to negative the custom, if we bear in mind that the class in which this custom prevails is comparatively small in this district. From the evidence of plaintiff's third witness, the father

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of Kottúr Rudrappa, it is clear that the custom prevails in the Bellary district. There seems to be no learned men, or men of note in this class, who can speak with authority on the customs and practices of this sect of Sivites. Defendant's first witness is the only learned priest who seems to know something of the doctrines of his sect and of the rites and the ceremonies to be performed. He said he had also heard of the existence of the custom from his father and a spiritual teacher, Rudrappa Sannyási, who is admitted in the evidence to have been a learned man of note and an authority in the caste rules and customs. This gentleman's presence at first defendant's marriage with Rudrava must be taken as sufficient to show that the marriage was sanctioned by custom. This witness is said to be interested in first defendant. I am unable to say so, and I think from his deportment that his evidence is fully reliable. I also find nothing suspicious in the testimony of defendant's other witnesses, and this, coupled with the evidence on plaintiff's side, and the acts and conduct of the parties, and the whole taken together lead to no other conclusion than that the existence of the custom is sufficiently made out. These customs, which may be at variance with the general law, seem to be influenced a good deal by the surroundings. In this district, which by its isolated position still retains many primitive customs and usages, we find the Jains, who recognise no divine authority in the Vedas, and do not practise the Sradhas or ceremonies for the dead, following the Aliyasantána law and worshipping Bhúts. (Devil-worship is very common in this district.) The adoption of sister's sons by the Nambúdris of Malabar may probably have had its origin in the customs of Nâyars. It seems that in places which were not influenced by Brahmanical laws, communities preserved their customs and usages, and if there was any change perceived, or attempted, as for instance in Malabar, to reform the marriage and other laws, it was owing to the influences of education and civilization which are now steadily permeating through several conditions of Hindú society. Mr. Mayne in his Hindú Law, § 87, says that among Jâts, a wife who has been deserted or put away by her husband may marry again, and will have all the rights of a lawful wife. In Western India Pát and Natra marriages prevail, and the 'right to a divorce and second marriage has been frequently affirmed by

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the Bombay Courts.' He refers to other classes in South India who follow these customs. In Steele's Hindú Law and Customs he observes that one of the points which is at variance with law and custom is the custom of a second and inferior marriage allowed to wives and widows in many castes. He mentions Nika, Pát, Natra and Oorkee (should be 'Údiki') as the inferior marriages allowed to wives and widows under certain circumstances. In Bengal, there appears to be Sagai and Shanga marriages corresponding to the Údiki in this case—*Kally Churn Shaw* v. *Dukhee Bibee*,(1) *Hurry Churn Doss* v. *Nimai Chand Keyal*.(2) These decisions show that the marriage according to the custom of a particular caste is sufficient. In *Kudomee Dossee* v. *Joteeram Kolita*,(3) it was held that divorce, though not contemplated by Hindú Law, yet, if it were a custom in the place, would have the force of law. If, therefore, a particular usage exists in a particular class or place, it should be respected, though it may be repugnant to Hindú Law. The plaintiff's vakíl relies on the decision reported at *Ráhi* v. *Govind Valad Tejá*.(4) The High Court held that the sons of a Punarbhu (twice-married woman) by a duly contracted Pát marriage are legitimate, and, as to the right of inheritance and extent of shares, rank on a par with the sons by Lagna marriage. In the present case the evidence is uniform as to the right of Sérai Údiki children being on a par with the right of children by Dhara marriage. In the case above quoted it was held that, as the wife did not receive a 'chor chiti' (release) from her first husband who was then living, or obtained any other sanction of her Pát, the intercourse between the wife and second husband was adulterous. In the present case it is true there was no 'chor chiti' or writing of divorcement. It, in fact, was not obtained. Defendants' case on this point is that Rudrava's first husband had forsaken her and that therefore her mother and relations had her married to first defendant, an eligible and respectable person, according to Údiki form. First defendant is acknowledged to be a member of the Committee for Religious Endowments of Lingáits."

Upon the evidence the Subordinate Judge found that Rudrava was forsaken by her first husband, and held that, according to the

(1) I.L.R., 5 Cal., 692.
(2) I.L.R., 10 Cal., 138.
(3) I.L.R., 3 Cal., 305.
(4) I.L.R., 1 Bom., 97.

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custom prevailing in her caste, she was at liberty to marry again and had married defendant No. 1 and proceeded as follows:—

"Even supposing that defendant No. 2 is illegitimate and was the offspring of adulterous intercourse, it is argued that she can inherit her mother's estate—*Mayna Bai* v. *Uttaram.*(1) In this case the High Court held that there was heritable blood between the illegitimate children of a European by a Hindú mother. This seems to be also the law in America under the New York Civil Code."

The plaintiff's suit was dismissed.

The Advocate-General (Hon. *P. O'Sullivan*) and *Srínivása Ráu* for appellant.

Rámáchandra Ráu Saheb for respondents.

It was contended, *inter alia*, for the appellant that there was no divorce known to the Hindú Law, and that the custom, if proved, was bad for immorality. Mayne's Hindú Law, § 61, *Ráhi* v. *Govind Valad Tejá*,(2) *Náráyan Bhárthi* v. *Laving Bhárthi*.(3)

The Court (Turner, C.J., and Hutchins, J.) delivered the following

Judgment:—The Subordinate Judge has written so able and complete a judgment in this case, that we are relieved from the necessity of entering into a minute discussion of the different issues on which the opinion of this Court has been sought in appeal; and it is sufficient for us to say that, with the exception of the Subordinate Judge's finding on the question as to the right of the respondent Kusava to succeed, if there was no valid marriage contracted by her mother with the defendant No. 1, an issue which we do not think it necessary to determine, we agree with the conclusions at which the Subordinate Judge has arrived and adopt his reasons.

Vírasangappa, the original ancestor, in arranging for the succession to his property, intended that the ordinary law which regulates Hindú inheritance should be to a certain extent abandoned. In the first place, he desired that the husband of his third daughter, if she married, should be placed in a higher position than an ordinary son-in-law, and that the third daughter

(1) 2, M.H.C.R., 196. (2) I.L.R., 1 Bom., 97. (3) I.L.R., 2 Bom., 140.

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and her husband should enjoy a larger proportion of his estate than they would have enjoyed, unless they had survived at least one of the other daughters; and he also intended, if the first and second daughters left issue of whatever sex, that that issue should succeed to the shares which, if a division were made under the settlement, would pass to the daughters.

In 1860, one daughter (Kusava) alone survived; her sister Malakama had left one daughter Nanjamma, and Nanjamma had left one daughter Rudrava; while Doddava, the third daughter of the ancestor, had left a son, the plaintiff (appellant) Vírasangappa. The appellant's father had married, as his second wife, Nanjamma, consequently that lady was the step-mother of the appellant and Rudrava his step-sister: and, as the Advocate-General has pointed out, this relationship entailed on him the necessity of maintaining them, and may have influenced him to assent to the arrangement, to which we shall next refer.

Such being the position of the members of the family in 1860, Kusava, the daughter of the common ancestor, executed the document, exhibit I, which is described as her will, but which was in fact also a family settlement, with the consent of the appellant and of Nanjamma. It is said she was at that time 65 years of age, and that the appellant had no reason to expect, having regard to the age she had attained, that he would greatly benefit by the immediate advantages secured to him by the settlement. As a fact, the lady lived for seventeen years after the date of that deed. The effect of the deed was to secure to the appellant the immediate enjoyment of a very considerable property, and it is not disputed that there was sufficient evidence of his assent to the arrangement, whatever the effect of it may be. It is, however, contended on his part, that by exhibit I, the interest secured to Nanjamma and her daughter Rudrava was an interest only for their lives, and that in the events which have happened the appellant is entitled to the property assigned to them.

We agree with the Subordinate Judge as to the construction of exhibit I, viz., that it gave to Nanjamma and Rudrava a life interest in the property set apart for them with remainder to their descendants if they left any, and that although Rudrava predeceased her mother Nanjamma, if respondent No. 2, Kusava, fulfils the description of a "descendant" of Nanjamma or Rudrava, she

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is entitled to inherit the property set apart for those ladies and their descendants by this instrument.

The learned Advocate-General has called our attention to the deed which was subsequently executed by Kusava the settlor, disposing of the house which she had retained for herself under exhibit I. In that document (exhibit D, which recites exhibit I) she refers to the arrangement made for her nieces and grand-nieces as having been made for their maintenance, and it is argued from this expression, and from the circumstance that she gives the property conveyed by that document to the same persons from generation to generation, that they understood that the provision secured to them by exhibit I was no more than an interest for life. So far as they are personally concerned, we have already intimated our opinion that it was only an interest for life, but it is not incompatible with provisions for maintenance that there should be a transfer of property to ladies for their absolute benefit or for the benefit of themselves for life with remainder to their descendants.

Ordinarily, no doubt, a provision by way of maintenance is intended to take effect only for the life of the person entitled to claim it, and therefore no more is necessary than to secure to such person the income of a fund for that period. But it is competent to the heirs, if they please, to make an arrangement for maintenance by an absolute grant, or to make it by a grant which provides more than an income, but yet is not absolute.

We cannot place a construction in exhibit D which necessitates the conclusion that the settlor Kusava understood she was conferring on Nanjamma and Rudrava and *their descendants* by exhibit I a less interest than that which we have found to have been secured to them.

The Subordinate Judge has alluded to conduct on the part of the appellant himself as illustrating the construction to be placed upon the settlement evidenced by exhibit I. The descendants of Nanjamma and Rudrava being then entitled, in our opinion, to claim the benefit under exhibit I of the property assigned to those ladies, the question remains whether defendant No. 2 is such a descendant? The learned note of Mr. V. N. Mandlik in his work on Vayavahára Mayuka lays down the only rule which could be safely adopted in Southern India, to determine what are valid

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marriages, and what are the incidents of marriages, viz., that we must look to existing usage which, even in the case of the higher castes, has more or less modified the Bráhmanical Law.

The parties are Súdras, and the sect to which they belong is rightly described by the Subordinate Judge to owe its origin to one Básava, who held that caste distinctions were unworthy of acceptance, and who repudiated Bráhmanical observances.

The sect is largely represented in Mysore, to a certain extent in the Wynad, also in the Ceded Districts, in Coimbatore and South Canara in this Presidency. Instances have come before the Court in which the re-marriage of widows amongst this sect has been supported;(1) and we agree with the Judge that there is sufficient evidence in this case to establish the further divergence from the Bráhmanical Law in the permitted re-marriage of wives by a secondary form of marriage. It is to be observed that some of the customs which are found among the Súdra castes appear to be supported by earlier law than that which now regulates the custom of the castes known as regenerate. In Nárada, and the collection which bears the honored name of Manu, there are to be found texts recognising the re-marriage of widows and of wives who have been deserted by their husbands, and the period within which such a marriage may be made by a deserted wife differs according to the caste to which the parties belong. To the Súdras no period is ascribed, for the caste immediately above them a period of one year or, in certain events, two years. Kamalákaran quotes the text of Nárada in a passage which will be found translated in Mr. Mandlik's work, page 434.

We advert to this ancient law, not with the intention of suggesting that it is to be regarded as now of force to regulate the decisions of the Courts, unless it is found to be in harmony with existing usage, but as affording evidence of the antiquity and corroborating other proof of the existence of a custom still in force among certain sections of Hindú society.

Several of the witnesses for the plaintiff admit the right of re-marriage among what they term the lower divisions of the sect to which the parties belong, a distinction which is somewhat opposed to the very fundamental doctrines of the sect. But we have proof of an instance in which a member of the priestly caste

(1) I.L.R., 7 Mad., 321.

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has contracted a second marriage with a lady who was either a widow or a wife, the evidence being conflicting as to whether or not her first husband was alive at the time of her second marriage. Others of the witnesses for the appellant profess they are unable to speak accurately as to the custom of their sect, but declare the question as to the validity of such marriages must be decided by the gurus of their mutt. The only evidence we have of that character is produced on the part of the respondents. The first witness for the defendant, Guru Santayya, who is a member of a priestly caste and a purohit, deposed to the existence of the custom alleged by the respondents, and he not only gave instances of it, but stated that he was informed of the custom by his father and his spiritual teacher one Rudrappa Sanyási, who was (it is admitted) a man of learning and an authority in the rules and customs of the castes.

The second witness deposes that there were present at the marriage, which is now impugned, this very Rudrappa Sanyási, besides the head of the Hosa Mutt, Guru Basavayya, and the head of the Murji Mutt, Virama Parvatayya. There were in all three heads of mutts present. We have also the evidence that the lady was treated as a lawfully wedded wife both by the appellant and by the other members of his family and by her caste, and we have also proof to show that the children of marriages contracted by wives deserted by their husbands and are not regarded as inferior in any respect to the parties to this suit are received in the mutts of the sect and initiated as the children born of a first marriage.

That Rudrava was deserted by her husband is sufficiently shown by the evidence to which the Judge alludes. He had never consummated his marriage, and he expressed himself ready to return and live with Rudrava only on condition that certain property was secured to him by deed. When his request was not acceded to, he took no further notice of Rudrava, but left her without information about him and did not attempt to prevent her from forming a new connection.

In the view we have taken of the validity of such a marriage it is unnecessary for us to determine whether, if it had not been so, the respondent Kusava could have claimed as a descendant of her mother.

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Vi'ra-sangappa v. Rudrappa.

We do not of course express any doubt that the illegitimate child of a Hindú might inherit property to which the mother is entitled in her own right absolutely; but in this case the further question would have arisen, whether Kusava would, if illegitimate, have fallen within the description of a "descendant" either of the natural grandmother or of her mother within the meaning of that term in the deed on which her title must rest.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1885. April 16.

9 Mad. 61.

AMMUTTI AND ANOTHER (DEFENDANTS Nos. 1 AND 10), APPELLANTS,

and

KUNJI KEYI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Mapillas—Adoption of Hindú Law—Presumption as to joint property.

Although Mapillas in Malabar ordinarily follow the Hindú custom of holding family property undivided, yet, as they are not subject to the same personal law as the Hindús, their claims cannot be governed by the legal presumption of joint ownership.

THIS was an appeal from the decree of F. H. Wilkinson, District Judge of South Malabar, reversing the decree of C. Chandu Menon, District Múnsif of Calicut, in suit 668 of 1882.

The facts necessary for the purpose of this report are set out in the judgment of the Court (Turner, C.J., and Hutchins, J.).

Sankaran Náyar for appellants.

Anantan Náyar for respondents.

JUDGMENT.—The Judge has erroneously stated that the same presumption as to joint ownership is to be applied as a presumption of law in the case of Mapilla families as in the case of Hindús. Although Mapillas in Malabar ordinarily follow closely the Hindú custom of holding family property undivided, yet, as the Mapillas are not subject to the same personal law as the

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* Second Appeal 200 of 1884.

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Hindús, their claims cannot be governed by the legal presumption of joint ownership. The Judge has also found as an issue of fact that the members of the appellants' family held their property jointly till the death of Koyama, and there is evidence which warrants that finding.

AMMUTTI v. KUNJI KEYI.

This appeal fails and is dismissed with costs.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

REFERENCE UNDER STAMP ACT, s. 46.*

1885. April 24.

Stamp Act, sch. I, art. 57—Settlement—Stamp duty.

Under art. 57 of sch. I of the Indian Stamp Act, 1879, stamp duty on a settlement is to be calculated on the value of the property settled as set forth in such settlement:

44 All. 339

Held, that these terms do not mean the value of the interest or interests created by the settlement, but refer to the value of the property settled, which, it was intended by Legislature, should be set forth in the settlement.

THIS was a case referred by the Board of Revenue, under s. 46 of the Indian Stamp Act, 1879, for the decision of the High Court.

The case was stated as follows:—

"On 22nd May 1880, Rajangam Ayyar executed a deed of settlement in favor of his wife, Santhammál, to whom was given a limited interest in certain immovable property and an absolute interest in certain movable property, the value of the whole being Rs. 1,500. The deed was duly registered by the District Registrar of Tanjore.

"In 1883, Santhammál sued upon this transfer deed, to the admissibility of which defendant took exception on the ground that it bore an insufficient stamp, because the properties were not valued according to their market-price, to ascertain which the Munsif issued a commission, which resulted in the report that the aggregate market values of the properties were Rs. 4,674-14-3 as against Rs. 1,500 recited in the deed, notwithstanding which,

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* Referred Case 1 of 1885.

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REFERENCE UNDER STAMP ACT, s. 46.

the Múnsif admitted the deed as sufficiently stamped, because it conveyed a limited interest only in the immovable property. Defendant then petitioned the Collector to prosecute executant under ss. 7 and 63, Act I of 1879, and to decide that the stamp duty should be assessed on the values of the properties as found by the Commissioner.

"The Collector referred the question to the District Judge, with an expression of opinion that the stamp duty should be determined on the market-value as found by the Commissioner, in which opinion the District Judge concurred and passed a declaration that the stamp duty should be determined with reference to the Commissioner's valuation, Rs. 4,674-13-6.

"On receipt of this declaration, the Collector called on executant to show cause why he should not be prosecuted, and finally passed an order that he should pay the deficient duty, Rs. 17-8-0, *plus* a penalty of Rs. 175, or stand a prosecution.

"Executant paid the deficient duty and penalty, and has now appealed to the Board for a refund of the latter under s. 42 of the Act, on the ground that the original valuation and stamp duty paid thereon was correct, because the deed transferred a limited, and not an absolute, interest in the immovable property.

"The point for decision is the correct interpretation of sch. I, art. 57, which declares that the stamp duty shall be calculated on 'the value of the property as set forth in such settlement.' It is an open question whether the setting forth is to govern the property only and not its value: in the interest of the stamp duty it ought to be the former, but the wording is vague; hence the necessity for an authoritative ruling."

The Acting Government Pleader (Mr. *Powell*) for the Board of Revenue.

The judgment of the Full Bench (Turner, C.J., Kernan, Muttusámi Ayyar, Hutchins, and Brandt, JJ.) was delivered by

TURNER, C.J.—If the terms "as set forth in such settlement" refer to the property settled, the duty is chargeable not on the value of the whole property which may be mentioned in the settlement, but on the value of the interest or interests created by the instrument which may, or may not be, co-equal to the value of the property. But if this was intended, the intention might have been less clumsily expressed.

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We are, however, of opinion that the terms apply not to the interests created by the instrument, but to the value set forth in the settlement, and that the law suggests that the settlor should insert the value.

REFERENCE UNDER STAMP ACT, s. 46.

It is obvious that it must be often difficult, and sometimes impossible, to value the interests created by a settlement, and the Legislature has, we imagine, on this ground amended the law by the introduction of the words we are considering. There are provisions which appear sufficiently to protect the revenue, if we adopt this construction.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

THE AGRA BANK (PETITIONER), APPELLANT,

and

CRIPPS AND OTHERS (DEFENDANTS), RESPONDENTS.*

1885. April 27.

35 Mad. 657.

Civil Procedure Code, s. 232—Purchase of decree by creditor of one of several judgment-debtors—Probability of decree being executed against another judgment-debtor, no ground for refusing execution to purchaser.

A decree for damages and costs having been obtained against P and C, A, to whom P was indebted and was about to assign property as security, in order to prevent P being adjudicated an insolvent, and with a view to execute the decree against C, if possible, purchased the decree.

A applied, under s. 232 of the Code of Civil Procedure, for leave to execute the decree. This application was rejected by Kernan, J., on the ground that the decree was certain to be executed against C and not against P, under whose orders and for whose benefit C acted when he infringed the right of, and became liable in damages to the plaintiff in the suit.

Held, on appeal, that the benefit likely to be gained by P by this transaction was no sufficient ground for refusing leave to A to execute the decree.

THIS was an appeal from an order of Kernan, J., dated the 24th of March 1885, dismissing an application made in civil suit 165 of 1884, under s. 232 of the Code of Civil Procedure, to place on record, in lieu of the plaintiff, the Agra Bank as transferee by assignment of the decree in the said suit.

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* Appeal 9 of 1885.

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There were four defendants in the suit—Pinsent, R. Cripps, F. Cripps, and Venkatasámi.

The decree directed delivery of indigo in the godown of Pinsent to the plaintiff, and that the defendants (except F. Cripps) should pay damages and costs. The indigo had been delivered, and the damages and costs amounted to Rs. 3,400.

Pinsent was arrested under this decree by the plaintiff, but was discharged at the request of the plaintiff before this application was made.

The application by the Agra Bank was opposed by R. Cripps, who filed an affidavit in which it was stated, on belief, that the application was made in the interest of Pinsent to relieve him from the decree by arresting Cripps and obliging Cripps to pay the amount of the decree.

Mr. *Shaw*, counsel for Cripps, referred to s. 232(*b*) of the Code, and contended that, though there was no transfer to Pinsent, the case came within the equity of the provision, and that the Court ought not to "think fit" to allow the decree to be executed at the instance of the Bank—*Soroop Chunder Hazrah* v. *Troylokhonath Roy*.(1)

The judgment of Kernan, J., was as follows:—

"In order to consider the circumstances under which the Bank took an assignment of the decree which, *primâ facie*, required to be explained, I examined Mr. Atkins, the Bank Manager, and Mr. Morgan, the Attorney for the Bank, and who had been Attorney in this suit for Pinsent, and Mr. Champion, now the Attorney for Pinsent, and I am satisfied that the main object of the Bank in paying, as they certainly did, the amount of the sum due on the decree to the decree-holder was to prevent Pinsent from becoming insolvent, and that such main object was not so far to benefit Pinsent, but to prevent litigation between the Official Assignee and the Bank and between Willis & Rodwell of London and the Bank and the Official Assignee, and to enable the Bank to realise from Pinsent and his property already pledged to, or agreed to be secured to, the Bank a large debt due by Pinsent. Shortly I may state that it appears that Pinsent in the beginning of 1884 and up to the present owes a large debt, upwards of Rs. 50,000, to the Bank, which was secured by (amongst other ways) deposit of title deeds

(1) 9 W.R., 230.

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of his properties. These properties he had, some time before he was arrested, agreed to assign to the Bank, and for this purpose one or more deeds have been prepared, but these were not executed when Pinsent was arrested. When the arrest took place Mr. Champion advised Pinsent that, as insolvency might follow, it was not desirable that Pinsent should then execute the deeds. There were also some questions between W. Rodwell & Co., who gave a guarantee to the Bank in 1884 for Pinsent, and Pinsent and the Bank as to the produce of goods exported to England for which Pinsent had drawn and negotiated bills through the Bank and some other questions as to funds standing with the Bank as security against loss on the shipment of those goods and otherwise. Under these circumstances Mr. Champion suggested to Mr. Morgan acting for the Bank that it was desirable that the insolvency should not take place. After some necessary delay of a day or so Mr. Morgan, having been consulted by Mr. Atkins, told Mr. Champion that the Bank would take a transfer of the decree from the plaintiff. The transfer was taken, Pinsent was by order released from arrest, and the insolvency was prevented. Then the main object of the Bank was accomplished and Pinsent was left free to give the securities to the Bank, who also was left free to accept them. Most probably the arrangement was worth to the Bank the sum they paid for it, Rs. 3,400. It was quite competent to the Bank to protect themselves from loss by making that arrangement which was so far wholly unobjectionable.

AGRA BANK v. CRIPPS.

"But then arises the question, why was a transfer taken of the decree which did not create any charge on property, and which could only be made available against the defendants personally or by seizure of property? As regards Pinsent, it does not appear that the Bank or their Attorney Mr. Morgan contemplated such arrest. Mr. Morgan, however, says he was not sure that Pinsent would not be re-arrested, and that at all events his property might be seized. However, it appears that Pinsent's property to a large extent was pledged to the Bank, and he had executed before he was arrested a deed of trust to one or more trustees for the benefit of his creditors; but Mr. Morgan says that there were only two or three creditors including the Bank and that Pinsent had other property not secured to the Bank or by the trust-deed. Before the transfer was finally settled, Mr. Atkins and Mr. Champion

AGRA BANK v. CRIPPS.

and Mr. Morgan had at least once met at the office of the latter to consider the matter, and then it appears that the question was suggested whether Cripps was of sufficient means to pay the decree amount, and Mr. Morgan said he thought so. As to Venkatasámi, the other defendant, it is not said there was any reference to his ability to pay. Apparently he has not means to pay. Mr. Champion says it was spoken of by the parties that Cripps would be liable to pay the amount by the ordinary legal means, which meant, of course, by arrest or by seizure of his property at suit of the Bank in execution as transferee of the decree. There is no doubt, therefore, that the object of the transfer was to execute the decree against Cripps. It is said for the Bank that it as transferee should have the right to realise the decree from Cripps, who was liable with Pinsent, and that no prejudice is due by the exercise of that right more than followed legally from the decree, inasmuch as the plaintiff could have arrested Cripps if the debt was not paid and if Pinsent became insolvent. Cripps might still be arrested and there could be no contribution, as the action was one for a wrong and not on contract. To this it may be said that Cripps could not resist the legal right of the plaintiff in the suit, unless it was executed by agreement with, or on behalf of, and for the benefit of, Pinsent, and to throw the *onus* on Cripps. If this decree had been transferred to Pinsent, it could not be executed against the others. The circumstances under which the transfer was arranged to be taken are peculiar, and would seem to show that, so far as Messrs. Morgan and Champion were concerned, there may have been an object on their part to have the transfer made in order to release Pinsent and throw the burden on Cripps. The circumstances are these: Mr. Champion has been for some years Attorney for Mr. Pinsent, but he was absent in Europe when this case was tried, and Pinsent then retained Mr. Morgan to defend this suit. The case was vigorously contended for Pinsent for two or three days, and then Pinsent stated that he did not see why he should defend the suit further, or something to that effect. At one of the interviews between Messrs. Morgan and Champion as to stopping the insolvency, the latter observed to the effect that the suit ought not to have been defended. Therefore, both these gentlemen have a professional interest in Pinsent and not unnaturally would wish to see their client free from the burden of the

damages and costs. The arrangement for the transfer would place the power of relieving Pinsent in the hands of the Bank, which Mr. Morgan was advising, and enable the Bank to realise from Cripps. If this was part of the real object of the transfer, I am not prepared to say that s. 232 might not apply as a transfer substantially for the benefit of one defendant. But both these gentlemen say that they had no such object in view as to throw the *onus* on Cripps and hereby save their client Pinsent. I cannot say that I am prepared to draw an inference from the facts which are contrary to these positive statements. Moreover, the amount is unpaid to the Bank. Mr. Morgan states that he thought Mr. Champion was acting in the matter on his own behalf, as costs were due to him by Pinsent for which Mr. Champion had a lien on the deeds entrusted by the Bank to Pinsent to realise debts. Mr. Champion, however, admits he acted as Attorney for Pinsent, though he also acted for himself, and was paid by the Bank the amount of his lien. But though there may not have been any definite intention to release Pinsent and throw the *onus* on Cripps, yet it is, I think, clear that such will be the result if the Bank as transferee is allowed to issue execution. It is clearly for the interest of the Bank not to execute the decree against property of Pinsent, as he is so deeply indebted to them. This consideration, with circumstances I shall presently mention, raise in my mind a serious question whether I ought, within the discretion given by s. 232, to see fit to allow the transferee to issue execution. As between Cripps on the one hand and Pinsent on the other, the latter is the person who ought to bear the damages and costs, and not Cripps. As regards the plaintiff in the action, all defendants were liable to the plaintiff for damages and costs, as they improperly interfered with the plaintiff's property; but Pinsent was the person in whose godowns the property of the plaintiff was, to recover which the suit was necessary, and Pinsent resisted the plaintiff's right to recover. The circumstances I referred to above, and the facts of this case as appear on the evidence before me, are as follow:—

"Plaintiff, at the instance of Venkatasámi and Cripps, the dubash of Pinsent, brought indigo to the godown of the latter for examination by him, and, if he approved of it, that price should be settled and plaintiff paid out of advances made by Pinsent to

AGRA BANK v. CRIPPS.

Venkatasámi. Then plaintiff put his lock on the godown, and though the indigo was examined and partly packed for shipping, plaintiff was not paid and would not let the goods be removed until he was paid, he never was paid, and brought this action to recover it against Venkatasámi, Cripps, and Pinsent, and afterwards against F. Cripps. It appeared on the admission of Pinsent that he refused to make any advance to Venkatasámi, and, at the instance of Mr. Willis, he agreed, however, that this should be done, viz., that Venkatasámi should assign plaintiff's goods (as if his own) to Cripps, and that then he (Pinsent) should give to Cripps a warehouse receipt, stating that Cripps had deposited these goods in Pinsent's godown, and that he (Pinsent) held them, and then that Cripps might, on deposit of the transfer of the goods and his (Pinsent's) warehouse receipt and on a promissory note, raise from the Madras Bank Rs. 5,000. Accordingly Pinsent personally approved of the assignment of the goods from Venkatasámi to Cripps, and he (Pinsent) signed the warehouse certificate of the deposit of the indigo as if received by him from Cripps, and thereupon the 5,000 rupees was got from the Madras Bank. When the money was received by Cripps, he gave it to Venkatasámi, and Rs. 3,500 of it were applied to release some indigo of Kondaya in Pinsent's godown, which he refused to give possession of until he was paid. The next day, or a few days after payment, Kondaya's indigo was shipped through Pinsent and a bill on London for the amount and for other goods was negociated by Pinsent. The amount so raised has passed through Pinsent's books, and the entries of it were proved before me. Pinsent said he did know personally that any portion of the money was paid to release Kondaya's indigo; he was told it was; and he says that the entry in the book was made without his knowledge and was afterwards corrected; but while I was trying the suit, it did not appear that the entry was so corrected. It was plain that Pinsent got at all events to the value of Rs. 3,500 of the Rs. 5,000, though it also appeared that Venkatasámi gave Cripps Rs. 300 or Rs. 500 out of the Rs. 5,000 for some commission due to him. Pinsent did not afterwards pay any part of that Rs. 5,000, but it was paid partly by R. E. Cripps to the extent of Rs. 1,000, and Rs. 4,000 was lent to him by F. Cripps on the deposit of the documents of transfer of the goods and the warehouse receipt.

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"The plaintiff demanded possession of the indigo from Pinsent, but he declined to give it up, though he had not paid anything on foot of it, and he admitted that he directed that a lock, covered with cloth on the doors of the godown where the indigo was, forcibly struck off by his directions and in his presence, was plaintiff's lock. When the suit was first filed, Venkatasámi, Cripps, and Pinsent were defendants, the Bank of Madras were then made defendants as holding the warehouse receipt and transfer and promissory note of Cripps. But the Bank required Cripps to pay, and he did so, and then F. Cripps was made defendant. An injunction was granted against the defendants Venkatasámi, Cripps, and Pinsent forbidding the removal of the goods, and at that time Pinsent said he had no interest on the goods, except as warehouse-keeper. However, he afterwards defended the suit and protracted the hearing by his resistance until he, on the last day, withdrew. Pinsent was, therefore, the person principally concerned in the illegal endeavour to pawn the plaintiff's goods. He approved of the false transfer by Venkatasámi and gave the false warehouse certificate; he took the benefit of the loan on plaintiff's goods to the extent of Rs. 3,500; the transaction passed through his books; and he shipped the indigo released with the Rs. 3,500 and never paid any part of it. He defended this suit and was the cause why it became necessary. As regards Cripps he acted in the transaction as the servant of, and for, Pinsent. I do not consider that the receipt by Cripps of Rs. 300 from Venkatasámi for some debt due for commission out of the Rs. 5,000 should lead me to believe that Cripps acted fraudulently. I think he only acted illegally in raising the money by the direction of Pinsent.

"Neither Cripps nor Venkatasámi appeared by Counsel to defend the suit—Pinsent did. As I have already observed Pinsent is the person as between him and Cripps and Venkatasámi who ought to pay the costs. The suit was one *ex delicto*, and there can be no contribution.

"Though the Bank have paid the money, they have accomplished the main object they had in doing so. If they had asked Pinsent to allow them to pay it for him and charge him for it, I have little doubt he would have readily assented, and they could then debit him with this amount and have his security for it. The recovery of this money, paid to avoid the insolvency of Pinsent, was

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AGRA BANK v. CRIPPS.

a secondary object with the Bank, and they selected the mode of taking a transfer of the decree at the advice of their Solicitor, who was aware of the facts as to Pinsent's conduct and that he was the master of Cripps and the person who directed Cripps to act illegally as regarded plaintiff's goods and was the real cause of the suit. If the Bank are now allowed to issue execution in this suit, can there be a doubt that Cripps will be proceeded against and that Pinsent will be allowed to go free? It is the interest of the Bank that this should be so, as Pinsent is so deeply their debtor. A transferee of a decree is not entitled, as a matter of right, to execute the decree. In ordinary cases where there is no doubt in case of the payment of the full amount to the decree-holder, the Court would make the order. But in a case where I cannot but feel that the assignment which enables the Bank to apply will, if carried out by them, release the person who really ought to pay the damages and costs and throw that burden on another. I do not think I ought to interfere or grant this motion.

"The first proposal that the insolvency should be prevented was made by Mr. Champion, the Attorney of Pinsent, and no doubt in the interest of Pinsent. Mr. Champion says that he did not propose that the decree should be transferred. It was, of course, greatly for the benefit of Pinsent to release him from practical arrest and prevent the insolvency, and still more to have an arrangement between him and the Bank, his largest creditor. Though the Bank acted in view to protect their own interest mainly, as they have accomplished that object, and as the whole proceeding is one which was, as a matter of fact, a benefit to Pinsent, and the levying this amount of the decree from Cripps would still further benefit Pinsent, I think it would be inequitable on the facts to allow the Bank to levy the amount, not from the person who really ought to pay, but from his dubash, Cripps, who became liable to the plaintiff's claim of damages and costs by doing the acts which Pinsent for his own benefit and purpose required him to do. I have already pointed out that Mr. Morgan, the Bank's adviser in the matter, was the Attorney for Pinsent in the action and in the arrangement to transfer. I do not doubt that for the great benefit conferred on Pinsent by releasing him from the practical arrest and consequent insolvency, the Bank will not find much difficulty in getting Pinsent to acknowledge liability for the damages and costs.

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35 Mad. 637.

"I refuse the motion, but without costs. The point is novel." AGRA BANK v. CRIPPS.

The Bank appealed.

Mr. *Grant* for the Bank.

Mr. *Shaw* for Cripps.

The judgment of the Court (Turner, C.J., and Hutchins, J.) was delivered by

TURNER, C.J.—With the highest respect for the opinion of the learned Judge, we are unable to see that sufficient grounds exist for refusing the transferee of the decree permission to execute it in its own name. Indeed all that would be done by refusing permission would be to compel the Bank to execute in the name of the original decree-holder.

The facts are these: the Bank desired to impede the execution of the decree against Pinsent, as it might drive him to the Insolvent Court, and, having ascertained that Cripps was of sufficient substance to answer the decree, the Bank purchased the decree.

It was originally represented that the Bank was merely a benámi holder for Pinsent, in which case the order of the Judge would, of course, have been most proper. The benefit which indirectly accrued to Pinsent had not, however, the effect of depriving the Bank of its right to enforce the decree against Cripps or the third judgment-debtor. It is not shown that the judgment-debt had been satisfied by payment.

If it had been, of course the Bank could not be regarded as the transferee of an existing decree and therefore could not be allowed to execute it.

In the events which have happened we do not find any ground which would justify us in refusing the application.

The order dismissing the application is therefore reversed, and the application for permission to execute is allowed. The appellant must recover his costs of the original application and of the appeal from the respondent Cripps.

Solicitors for the Agra Bank—*Barclay & Morgan.*

Solicitors for Cripps—*Grant & Laing.*

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1885. May 1.

MIRABIVI AND ANOTHER (PLAINTIFFS Nos. 1, 2), APPELLANTS,

and

VELLAYANNA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Custom—Practice—Labis—Ravuthans of Palgát—Muhammadan religion—Hindú Law of inheritance—Exclusion of widow and daughters by sons—Evidence necessary to support valid custom.

A claim by the widow of S. Ravuthan, a Labi of Palgát, and her daughters for their shares of his estate under Muhammadan Law was opposed by other members of the family, who pleaded that, according to a special custom obtaining among the Ravuthans of that part of the country, adopted from Hindú Law, females are excluded from inheritance if sons or sons' sons exist. In two instances it was proved that women of this class had obtained shares under Muhammadan Law by suits without this plea having been put forward.

The District Múnsif described these cases as interruptions and found on the evidence that the custom was proved.

On appeal this decree was confirmed by the Subordinate Judge.

Held, that no valid custom was established by the evidence.

A custom to be valid must be consciously accepted as having the force of law.

THIS was an appeal from the decree of C. Rámáchandráyyar, Subordinate Judge of South Malabar, confirming the decree of B. Kamáran Náyar, District Múnsif of Temelprom, in suit 240 of 1882.

The facts necessary for the purpose of this report appear from the judgment of the Court (Turner, C.J. and Hutchins, J.).

The Acting Advocate-General (Hon. *H. H. Shephard*) and *Gopálan Náyar* for appellants.

Mr. *Branson* for respondents.

JUDGMENT.—The parties to this appeal belong to a Ravuthan family of Palgát. The appellants are one of the widows of Sheithu Ravuthan and her daughters; the respondents, the son and other

* Second Appeal 11 of 1884

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representatives of the same deceased person, and the sons, widow, and daughters of his brother. Appellants sued for partition of the property. Respondents pleaded, *inter alia*, a special custom among the Ravuthans of that part of the country restricting females to maintenance and marriage expenses where there are sons or sons' sons. Both the Courts below have found in favor of this custom and have dismissed the appellants' suit for partition. The question before us is whether there is evidence on which such custom could reasonably have been found to exist.

It is not contended that these Ravuthans are not in other respects governed by the Muhammadan Law. What is alleged is that, though following the law of their religion generally, they have adopted this principle of the exclusion of females, from the Hindú Law, subject to the qualification that there are sons or sons' sons, and that the custom has been so universally recognised among them as to have the force of law.

It must be admitted that instances have been adduced in which the claims of daughters and sisters to a share have been ignored, or they have been allotted maintenance, though the cases mentioned by the Judge of a partition in the father's lifetime are not inconsistent with Muhammadan Law. There are also cases in which married daughters have been treated as estranged from the family. But instances of this kind will be found to occur where there is no doubt that the family is governed by pure Muhammadan Law. Indeed, in many parts of the country it is unusual for Muhammadan ladies to insist on their unquestioned rights. They will often prefer being maintained by their brothers to taking a separate share for themselves, and when they are married the marriage expenses and presents are often, by express or implied agreement, taken as equivalent to the share which they could claim. Moreover, Muhammadan females are so much under the influence of their male relations, that the mere partition of the property among the males without reference to them cannot count for much. A single instance to the contrary would outweigh many such partition deeds when the existence of a binding custom is in question. Instances to the contrary have been established, and notably two suits in which women of the class in question have recovered their shares, and the custom now set up was not even pleaded against them. The District Múnsif describes these

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MIRABIVI v. VELLAYANNA.

instances as interruptions; but, in our opinion, they deprive of all force those partition deeds and other similar agreements in which voluntarily, or for some consideration, or under advice of mediators, the females may have simply abstained from pressing their claims.

The evidence of the Kázi of Palgát is peculiarly noticeable to show that what the respondents assert as a custom is a mere practice, more or less common, and that it has not the characteristic of a genuine custom, viz., that it is consciously accepted as having the force of law.

The judgment of Mr. Justice Innes(1) is certainly valuable evidence in support of the custom; but it could not bind the present parties even if it had been affirmed on appeal. But, as the Subordinate Judge has shown, the appeal was not dismissed on the merits, but settled by a compromise in which substantial provision was made both for the plaintiff's unmarried sister and for his widowed sister-in-law, and against that judgment there are those just mentioned which awarded shares to female plaintiffs.

With some reluctance we have come to the conclusion that the decrees below cannot be maintained. They must be reversed and the suit remanded to the Court of First Instance for decision on the merits. We are not to be understood as declaring that the plaintiffs are absolutely entitled to their full legal shares of the whole property. It is in evidence that two of the younger ladies have been married and received portions. It may well be that these portions were paid in full discharge of their claims on the estate, and the evidence that these Ravuthans lean toward Hindú usages renders this not improbable, though it fails to establish a custom having the force of law.

The costs hitherto will abide and follow the result.

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(1) In Civil Suit 5 of 1877 in the High Court.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1885. April 1.

12 Bom. 221.
12 Mad. 43.
27 Mad. 576.
15 C.W.N.
15 C.W.N. 97
39 Cal.

VIRESA AND OTHERS (PLAINTIFFS), APPELLANTS,

and

TATAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Fishery—Tidal river—Prescription.

The right of the public to fish in tidal waters in British India may be curtailed by an exclusive privilege acquired by grant or prescription by certain persons within certain limits.

Such an exclusive privilege being an infringement of the general rights of the public, could be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown.

THIS was an appeal from the decree of W. J. H. LeFanu, District Judge of Kistna, dated 15th February 1884, reversing the decree of O. S. R. Krishnamma, District Múnsif of Masulipatam, in suit 828 of 1881.

The plaintiffs, fishermen living at Kondangi on the banks of the river Upputéru, sued for the removal of fishing stakes and nets erected by the defendants contrary to the alleged customary right of the plaintiffs, and for a perpetual injunction against the defendants, prohibiting them from placing stakes and nets in the river above the plaintiffs' stakes and nets.

The District Múnsif decreed the claim.

On appeal the District Judge dismissed the suit.

The material portion of his judgment was as follows:—

"It may be, as stated in the Lower Court's judgment, that there is evidence that no one except the members of the four villages in question for sixty years planted stake-nets in the Upputéru; but population has increased, fresh villages have sprung up, and what is a right at common law, accruing to each individual at his birth, cannot be annihilated by any such possession. It is possible that no one but the residents of a certain village may,

* Second Appeal 478 of 1884.

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VIRESA v. TATAYYA.

for a long series of years, have used a certain highway; but the highway being open to all, this would not avail them to restrict any person not belonging to their village from using the said highway.

"The right to catch animals *feræ naturæ* of the creek in question is a right belonging to all, subject to the restriction contained in the maxim '*sic utere tuo ut non lædas alieno*,' and, when equal rights conflict, the way out of the dilemma is, not to rob one party of their rights, but to find some *modus vivendi*, some plan whereby, by mutual concession, the owners of these rights may exercise their rights without, as far as may be possible, infringing the rights of others.

"This is a suit for a perpetual injunction, and, if plaintiffs fail, there is an end of the suit: had there been a prayer 'for such relief as the Court thinks fit to grant,' I would have sent down an issue to find within what distances and at what hours the riparian residents of the Upputéru can put down stake-nets with the minimum of injury to the existing rights of the several villages. This is the general purport of the issue which I would have proposed. It would no doubt be subject to modification, but as it is impossible to send it down, the point need not be considered."

The facts necessary for the purpose of this report appear from the judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.).

Anandácharlu for appellants.

Subbaráyudu and *Gopaláchâryar* for respondents.

Appellants' pleader referred to *Bában Mayacha* v. *Nágu Shravucha* (1) and Angell on Water Courses, p. 73.

Respondents' pleader cited *Lord Rivers* v. *Adams*,(2) *Empress* v. *Charu Nayiah*,(3) and *Lutchmeeput Singh* v. *Sadaulla Nushyo*.(4)

JUDGMENT.—In the district of Kistna there is a lake named the Kolléru, whence a stream, the Upputéru, takes its rise and flows into the sea, being throughout its whole course tidal. At a distance of from 6 to 8 miles from the head of the Upputéru is situated a village named Kondangi, the residence of the plaintiffs (appellants).

At a particular season of the year, viz., from the beginning of

(1) I.L.R., 2 Bom., 19.
(2) 3 Ex. D., 361.
(3) I.L.R., 2 Cal., 354.
(4) I.L.R., 9 Cal., 698.

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the rainy season to the end of harvest, fry of fish bred in the lake and in sundry irrigation channels which empty themselves into the Upputéru pass down the river towards the sea and are intercepted by stake-nets placed across the river by the inhabitants of certain villages on the banks of the stream.

The plaintiffs in this suit claim that there appertains to the residents of Kondangi, by immemorial prescription, a right to place stake-nets across the river in the neighbourhood of their village, and to prevent any other person from placing similar nets at any point between their village and the place at which the stream issues from the Kolléru lake. They complain that in 1880 the defendants interfered with the exercise of this right and erected stake-nets so as to interrupt the free passage of the fry to the nets at Kondangi. They prayed for an order for the removal of the nets placed by the defendants and for a perpetual injunction to restrain them from replacing such nets.

The defendants who appeared and opposed the claim set up several defences: the defendants 1—5 pleaded that they had for thirty years erected stake-nets at their village, Sunnampúdi; they denied that the plaintiffs enjoyed an exclusive right to the fishery between Kondangi and the source of the Upputéru; and they also contended that if the plaintiffs had any right it was not injured by their act, inasmuch as there were irrigation channels below the point at which their nets were placed, whence fry might pass to Kondangi. The 8th, 11th, 14th, 16th, 17th, 18th, 20th, and 27th defendants contended that they had an equal right to fish with stake-nets with the plaintiffs, and that their nets were placed at a distance of 8 miles from Kondangi and could not interfere with any right claimed by the plaintiffs.

The Múnsif, Mr. O. S. R. Krishnamma, in a very able judgment, discussed the nature of the claim made by the plaintiffs, and held that it was one of which the law would take cognizance.

Finding that for upwards of sixty years the plaintiffs had enjoyed the exclusive right claimed by them, and that they had resisted successfully attempts to interfere with it after that period, that the acts of the defendants, or of some of them, of which the plaintiffs complained, practically deprived the plaintiffs of the benefit of their fishery, and that they had been committed in and subsequent to October 1880, he granted the injunction prayed.

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VEERA v. TATAYYA.

On appeal the Judge, while he considered it proved that the plaintiffs had enjoyed a customary right of fishing with stake-nets at Kondangi, held that they had not proved they had an exclusive customary right to the fishery between their village and the source of the Upputéru. He regarded a decision passed by the Múnsif in original suit No. 162 of 1877 as conclusive on that point, but, without basing his judgment on this ground and allowing that there might be evidence that for sixty years before 1876 no one except the residents of the plaintiffs' village had planted such nets in the Upputéru at or above the plaintiffs' village, he held that the right to fish in a tidal stream was a right belonging to all men, and that no one could be deprived of it by any such prescription or custom as was claimed by the plaintiffs. At the same time probably in reference to the decision in *Bában Mayacha* v. *Nágu Shravucha*,(1) he intimated that if the plaintiffs had not asked for a perpetual injunction, but for such relief as the Court thought fit to grant, he would have sent down an issue to ascertain within what distances and at what hours the riparian residents of the villages above Kondangi could put down stake-nets with a minimum of injury to the existing rights of the plaintiffs and the inhabitants of three other villages below Kondangi to whom the plaintiffs concede the possession of a right of fishing further down the stream.

Although the general if not the universal law of civilised nations recognises in all citizens a common and general right of fishing in the sea and in all bays, coves, branches and arms of the sea and in all navigable and tidal waters (Angell, ch. 3, § 65 *a*), this right within the territorial waters may be restrained or regulated by the legislature, and it may be curtailed by an exclusive privilege acquired either by grant or prescription by certain persons within certain limits. This exclusive privilege may apply to all fish to be found within such limits and to all methods of fishing or only to certain kinds of fish or a certain method of fishing. Inasmuch as the property in the soil is presumed to vest in the sovereign power on behalf of the public where private ownership of the soil is not proved, the right to fish in the waters which flow over it can be asserted in England only in virtue of a grant from the sovereign power or by such a degree of exclusive

(1) I.L.R., 2 Bom., 19.

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use and occupation as is sufficient to raise a presumption that such a grant has been made though not now appearing.

Sir William Blackstone proposes to confine the term free fishery to an exclusive right of fishing in a public river. This use of the term has not been adopted by other authorities; but it seems there is no difference between the opinion of Blackstone and other lawyers that it is a royal franchise and was so regarded in all countries where a feudal policy prevailed—(I Stephens Blackstone, p. 679).

In England the importance of protecting the common right of all classes to fish in public waters was so highly regarded, that by Magna Charta the prerogative of the Sovereign to make such grants was restrained. And in the reign of Edward I a statute was passed which prohibited the total interruption of navigable streams by the erection of weirs or other machinery for fishing.

In England, then, such a prescription in public waters must be founded on immemorial use and occupation, and in the case of navigable streams the maintenance of a fishing weir which interrupts navigation cannot be claimed, if there is evidence that it came into existence subsequently to the statute of Edward I. In this country we know of no law which prevented the Sovereign from making a grant of a common of fishery. There is no law, nor do we know of any custom, which distinctly determines the period of exclusive possession necessary to prove a title by prescription to such a common of fishery; but as an infringement on the general rights of the public it is clear that the right could be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown.

In the case now before us, if the plaintiffs established as the Múnsif found that for sixty years they had enjoyed the exclusive right of fishing with stake-nets in that portion of the stream which lay between their village and the lake, and that when their right was invaded, they had successfully resisted the invasion and enjoyed and maintained their exclusive right up to the period which is asserted as the date of the cause of action, it appears to us they would have been entitled to the relief they claim.

The evidence adduced by the defendants showed that from time to time attempts have been made by persons who were not residents of the villages in which the plaintiffs admit a right of

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fishery exists, to establish their common law of right of fishery in Upputéru. On two occasions, viz., in September 1868 and again in April 1871, the then Collectors had, it would appear, expressed an opinion that the fishery was open to the public. In 1870-71 the Government had leased the fishery in the Upputéru, and their renters or sub-renters practised fishery with stake-nets; but at the instance of the local fishermen, the lease was withdrawn and its issue was characterised by the Board of Revenue as oppressive (Board's Proceedings, No. 472, dated 28th March 1873—G.O., dated 7th April 1875).

In November 1875 the Collector ordered the Kykalúr Sub-Magistrate to remove the stake-nets which were fixed in other than the customary places (exhibit B).

On the 3rd November 1876 the Collector published a notice prohibiting persons from placing stake-nets in places where it was not usual to place them (exhibit D), and certain persons were punished for a disobedience of this order (exhibits E, F, G, and H).

Some of the defendants, feeling themselves aggrieved by the notice in the gazette of June 1876, instituted original suit 162 of 1877 against the Collector praying for a declaration that the order was invalid so far as it affected the construction of stake-nets at Sunnampúdi; and the District Múnsif, although he found that the practice had its origin only in 1871, held that the Collector's order was *ultra vires*, and gave the inhabitants of Sunnampúdi a decree.

This decree obviously could not bind the present plaintiffs who were no parties to that suit.

We see nothing in the proceedings now on the record which could deprive the plaintiffs of the right claimed by them if it be found that they had established it prior to 1868.

But, assuming that the plaintiffs had not established a right to such a common of fishery as they claimed, they may have established a right to a fishery of such a nature that they are entitled by custom to prevent the exercise of a similar right by any other persons within a distance, which would necessarily injure the exercise of the right by the plaintiffs. The learned judgment of the late Chief Justice of Bombay in the case to which we have already referred establishes that a fishery common to the public

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may be used subject to such regulations as are essential for its enjoyment by members of the public.

In the case now before us, if it be shown that the nets of the defendants, or of any of them, are placed in such a position as to destroy the benefit the plaintiffs would derive from the stake-nets erected at their village, although the Court would not be justified in granting an injunction to the full extent claimed by the plaintiffs, it might possibly find the plaintiffs entitled to an injunction of a more qualified character. As yet the Appellate Court has pronounced no judgment upon the facts, and it would be premature for us to do more than indicate what we believe to be the law.

We shall set aside the decree of the Judge and direct a rehearing of the appeal.

The costs of this appeal will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Brandt.

1885. April 10, 25.

SANKARAVADIVAMMÁL (DEFENDANT No. 7), APPELLANT,
and
KUMARASÁMYA (PLAINTIFF), RESPONDENT.*

17 Bom. 49. 23 Mad. 365. 23 All. 346. 6 C.W.N. 12. 30 Cal. 137.

Civil Procedure Code, ss. 224, 331, 332—Decree on compromise—Execution against party to suit, not party to compromise—Resistance to execution—Procedure.

In a suit for partition a compromise was entered into by all the parties except S, and a decree obtained on the terms thereof. In execution S was dispossessed and presented a petition to the Court, objecting that the decree was not binding on her. The petition was rejected:

Held, that the objection raised by S ought to have been investigated under s. 244 of the Code of Civil Procedure, and that S was entitled to appeal against the order rejecting the petition.

THIS was an appeal against the order of J. C. Hughesdon, District Judge of Tinnevelly, confirming an order of the Subordinate Judge, K. R. Krishna Menon, in execution of the decree in suit 37 of 1882.

Appellant was defendant No. 7 in that suit, which was brought for partition of family property by the respondent, Kumarasámya

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* Appeal against Appellate Order 2 of 1885.

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Pillai, against his brothers. Defendant No. 7 was the mother of the other parties to the suit and claimed to be entitled to a portion of the property in suit. The parties, other than defendant No. 7, compromised the suit and a decree was passed on the terms thereof behind her back. Execution having issued, defendant No. 7 was dispossessed of certain property. She thereupon presented a petition to the Court objecting that the decree could not bind her, and praying that the delivery of possession of the property made by the amín might be cancelled.

This petition was heard with others presented by the plaintiff and another defendant in the suit.

The Subordinate Judge held that, as defendant No. 7 had no possessory or proprietary right under Hindú Law, she could not present a petition under s. 332 of the Code of Civil Procedure and that s. 244 was not applicable.

On appeal the District Judge referred to *Venkatammál* v. *Andyappa* (1) and rejected the appeal.

Defendant No. 7 appealed on the grounds—

(1) that she was not bound by the decree;

(2) that she could not be dispossessed under the decree.

With this appeal defendant No. 7 also presented a petition under s. 622 of the Code of Civil Procedure against the order of the Subordinate Judge.

Báláji Ráu for appellant.

Bháshyam Ayyangár for respondent.

The Court (Hutchins and Brandt, JJ.) delivered the following Judgments:—

HUTCHINS, J.—The only difficulty in this case is due to the irregular manner in which all the proceedings have been conducted in the Subordinate Court. The doubt is whether the appellant is not in this dilemma—either she is not a party and cannot appeal, or she is a party and therefore bound by the decree. The respondent admits that her contentions have not been properly disposed of, but relies on this dilemma.

The suit was brought by one of appellant's sons for partition. Her defendant-sons said she held possession of some of the property and she was made defendant No. 7. She claimed to be in possession of some and entitled to a share of all; admittedly she

(1) I.L.R., 6 Mad., 130.

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is entitled to maintenance and her claim to maintenance ought to be provided for in any decree distributing the property. An issue was framed with regard to her claim, but, instead of proceeding to trial, the other defendants and the plaintiff appear to have come to an arrangement behind her back, and a decree, purporting to deal with all the property and to bind the appellant as one of the parties thereto, was passed behind her back and without her consent.

SANKARA-VADIVAMMÁL v. KUMARA-SÁMIYA.

So far as appears, the first time she knew of this decree was when an amín came and sought to eject her in execution. She at once put in a petition No. 323, setting out the above facts, and it is on that petition, and others less material, that the Subordinate Judge's order was passed. But that order entirely ignores the facts relied on and the material contention that the decree cannot affect or be executed against the appellant. It treats the appellant not as a party-defendant, but simply as the mother of the contending brothers, and it deals with her claim as if it had been made under s. 332 by one not a party to the suit.

The order of the District Judge in appeal also passes over the principal grounds in the appeal petition; but it is possible that the case was presented in a different light in the argument.

It seems to me that the question between the plaintiff and his mother, the appellant, whether she can be turned out in execution, is clearly one relating to the execution of the decree, and as such to be determined under s. 244. I also think that the defendant No. 7 is a party to the decree, although it would apparently satisfy the terms of the section if she were a party to the suit only and not to the decree. Of course it is true that a party to a decree is generally bound by it and cannot go behind it, but here the appellant took the first opportunity of contending that she was not bound by it, and asked the Subordinate Judge to decide that she could not be bound by it. This she was competent to do by petition: the petition raised the point and the Subordinate Judge was bound to determine it. The way in which he ought to have determined it is quite clear. The compromise behind her back cannot possibly affect her position, nor can the decree, which on its face has no basis beyond an agreement between other parties. The decree is a nullity so far as defendant No. 7 is concerned, and the matter in dispute between her and the plaintiff has still to be determined as an issue in the regular suit.

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SANKARA-VADIVAMMÁL v. KUMARA-SÁMYA.

The result would probably have been the same if the suit had been abandoned against defendant No. 7 and her petition could have been dealt with under s. 331. She would then have been a person, other than the judgment-debtor, claiming in good faith to be in possession and entitled to hold possession till her maintenance had been provided for. There is no doubt that as against her sons her maintenance is a charge on all the property. The dispute would have had to be registered and tried as a regular suit, and the only question for us would have been whether there was such material irregularity in the order of the Subordinate Judge as to justify our interference under s. 622.

The appeal must be allowed, the orders of the Courts below reversed, and the Subordinate Judge directed to restore the case to his file and pass fresh orders. The respondent (plaintiff) will pay the appellant's costs throughout, except that the revision petition will be dismissed without costs.

BRANDT, J.—A suit was brought in the Court of the Subordinate Judge of Tinnevelly in which the plaintiff (respondent) sued various members of his family for partition of family property. The appellant, mother of the plaintiff and other parties, was admitted to the suit as defendant No. 7 at her own request, in order that she might establish her right to possession—for her life at least—of some three acres of land, of which she alleges she is in possession, and of a part of a house, in lieu of, or as, maintenance. The members claiming partition put in a razináma, under which it was mutually agreed that they should each take a certain share of the property in suit. The appellant was no party to that razináma. Decree was passed in accordance with the terms of the razináma, in which, and in the decree passed in accordance therewith, there is no reference to, nor adjustment of, the claim of the appellant; but in the heading to the decree the names of all the parties on the record, including that of the appellant, appear. When one or more of the sharers under the decree applied for ascertainment division and delivery of his or their shares, the appellant objected by means of a petition in execution, that, inasmuch as she was no party to the decree, it could not be legally executed so as to affect her interests in any way or to deprive her of possession.

The Subordinate Judge in effect allowed her objection in so far as it related to possession of a part of the house in which she

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resided when the suit was brought, on the ground that "she has, of course, a right to live in the family-house and to her exercise of that right," and that "the plaintiff (her eldest son) does not object;" but as to the land, though there is no express order, the Subordinate Judge must be taken to have disallowed it on the ground that "under the Hindú Law the mother has no possessory or proprietary right in the family property, and what she has is only a right to maintenance."

On appeal against that order the District Judge rejected the appellant's petition on the ground that the order of the Subordinate Judge appears to be in accordance with the decision in *Venkatammál* v. *Andyappa*.(1)

It is contended on behalf of the appellant that as she is a party to the suit in which the decree was passed, any question arising between her and another party to the suit and relating to the execution of the decree can and must be determined in execution-proceedings and not otherwise.

As to whether or not the appellant is a party to the decree by reason of her name appearing in the heading thereto, the vakíl for the appellant appeared to be in some doubt, and also as to the result, if it were held she was or was not a party.

For the respondent it was contended that there is no appeal in this case, the appellant not being a party to this decree, or that if she is a party to the decree, she is bound by it, and her only remedy is to apply to the Court which passed the decree for a review or amendment of the decree; and that if she is not a party to the decree, her remedy is to bring a fresh suit, or to make a claim or objection as a person not a party to the decree, who, being in possession, is dispossessed.

It appears to me that it is open to the appellant to have the objection raised by her heard and determined under s. 244, the wording of the section being "questions arising" not between parties to the decree, but "between parties to the suit in which the decree was passed." She was and is a party to the suit: her claim has not been adjudicated on. The other parties to the suit having elected to settle the matters in dispute between them without reference to her, and a decree having been made in accordance

(1) I. L.R., 6 Mad., 130.

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SANKARA-VADIVAMMÁL v. KUMARASÁMYA.

with such agreement, the decree must be treated as one entitling them to partition of their shares, subject, however, to all the appellant's asserted rights; or, if they claim in execution more than this, the Court must either disallow the claim as having been virtually given up as against the appellant, or it must re-open the case, and, after deciding the questions at issue between the appellant and the other parties, amend the decree or pass a fresh decree.

The adjustment of the suit is final only in so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement.

There is no such adjustment or agreement in respect of this appellant's interest as can be recognised, for she did not consent thereto; and, indeed, it is not pretended that the razináma purported even to deal with her interest.

With these observations I would set aside the order of the Lower Appellate Court and the order of the Court of First Instance in so far as it disallowed or did not deal completely with the objection of the appellant in respect of the land which was in her occupation and enjoyments. It is unnecessary and undesirable to express any opinion upon the merits of the appellant's claim. I would, except as regards the revision petition, allow the appellant's costs throughout, as the parties to the decree put in their agreement and got their decree behind the back of the appellant and then tried to execute it as against her.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1885. January 9. April 27.

12 Bom. 352.
13 Do. 537.
19 Mad. 51.
21 Do. 24.
.. ... 252.

KARUTHASÁMI (DEFENDANT No. 1), APPELLANT,

and

JAGANÁTHA (PLAINTIFF), RESPONDENT.*

Mortgage—Decree for redemption—Second suit to redeem—Civil Procedure Code, ss. 13, 244.

A decree obtained by a mortgagor, which declared that the mortgagee should deliver up possession on payment of the sum found due to him, not having been

* Second Appeal 732 of 1884.

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executed for three years, a purchaser of the equity of redemption sued the mortgagee to redeem:

Held, that this suit was not barred by the former decree and that the plaintiff was entitled to redeem. *Sámi* v. *Sómasundram* (I.L.R., 6 Mad., 119) approved. *Rám Sávant Bál Sávant* v. *Náráyan Dhond Sávant* (I.L.R., 7 Bom., 467) dissented from.

24 All. 44.
25 Mad. 253
301.

THIS was an appeal from the decree of T. Ganapathi Ayyar, Subordinate Judge of South Tanjore, dated 21st April 1884, confirming the decree of S. Subbayyar, District Múnsif of Tanjore, in suit 332 of 1882.

The plaintiff, Jaganátha Pillai, alleged that a certain garden had been mortgaged by its owner, Rangasámi, to defendant No. 1, Karuthasámi Vandayan, and was in his possession. That one Panchanádayyan, the father of defendants Nos. 3, 4, 5, bought the said garden at a sale in execution of a Small Cause Court decree against Rangasámi in 1877, and in 1879 brought a suit to redeem the mortgage and obtained a decree directing that the property should be delivered up to him on payment of the mortgage debt.

That in 1880 Panchanádayyan sold his interest to defendant No. 2, who transferred the same to plaintiff on 5th June 1882. That plaintiff attempted to execute the decree obtained by Panchanádayyan, but, as no transfer of the decree had been obtained, the Court by an order, dated 18th November 1882, refused to allow him to execute the decree. The plaintiff, therefore, claimed either to be allowed to redeem or to be declared entitled to execute the decree obtained by Panchanádayyan. Defendant No. 1 pleaded, *inter alia*, that the plaintiff had no cause of action, and that his remedy was to execute the former decree, and that execution of the said decree was barred by limitation.

The District Múnsif held that the former decree, being merely declaratory, was no bar to the suit and decreed redemption, citing *Sámi* v. *Sómasundram*.(1)

On appeal this decree was confirmed. Defendant No. 1 appealed to the High Court.

Mr. *Wedderburn* for appellant.

Sádagopácháriyar for respondent.

For appellant it was contended that the decree in the former

(1) I.L.R., 6 Mad., 119.

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KARUTHASÁMI v. JAGANÁTHA.

suit, though not framed in the manner now prescribed by s. 86 of the Transfer of Property Act, 1882, was, nevertheless, a decree which could have been executed, and that ss. 13 and 244 of the Code barred this second suit, for which there ought not to have been any necessity if plaintiff had obtained a transfer of the former decree.

If this was not so, any number of suits might have been filed, and any number of decrees given for redemption.

The fact that the former decree could not now be executed ought not to affect the question. The mortgage was merged in the decree. *Higgin's case*,(1) *King* v. *Hoare*,(2) *Anrudh Singh* v. *Sheo Prasad*,(3) *Sheik Golam Hossein* v. *Alla Rukhee Beebee*,(4) *Dobee Singh* v. *Jowkee Ram*,(5) *Gan Sávant Bál Sávant* v. *Náráyan Dhond Sávant*.(6)

[The Chief Justice referred to Coote on mortgages and to the practice of the English Court of Chancery (see ch. 84, ss. 3, 7, 13).]

The only procedure which can be followed in India is that laid down by the Code.

For the respondent *Sámi* v. *Sómasundram*,(7) *Periandi* v. *Angappa* (8) were relied upon.

The Court (Turner, C.J., and Hutchins, J.) delivered the following

JUDGMENT:—The appellant relies on the cases of *Sheik Gholam Hoosein* v. *Alla Rukhee Beebee*,(4) *Anrudh Singh* v. *Sheo Prasad*,(3) and *Gan Sávant Bál Sávant* v. *Náráyan Dhond Sávant*.(6) In the first of the cases cited, the original suit was not, strictly speaking, a suit for redemption, but a suit to recover property on which the mortgage debt had, it was alleged, been discharged. The decree was absolute and not conditional. In *Anrudh Singh* the facts are not reported. It is only stated that the Court followed the decision in *Sheik Golam Hoosein* v. *Alla Rukhee Beebee*. It may be presumed the facts of the two cases were similar. It may be admitted that the decision of the High Court of Bombay is in favor of the appellant, but Mr. Justice Kemball apparently relies on the decision in *Sheik Gholam Hoosein's* case without noticing the difference

(1) 6 Rep., 45.
(2) 13 M. & W., 494.
(3) I. L.R., 4 All., 481.
(4) N.W.P., 1871, p. 62.
(5) N.W.P., 1868, p. 381.
(6) I.L.R., 7 Bom., 467.
(7) I.L.R., 6 Mad., 119.
(8) I.L.R., 7 Mad., 423.

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between the case decided in the Allahabad Court and that which he was considering.

KARUTHASÁMI v. JAGANÁTHA.

In the case before us, Panchanádayyan, in December 1879, obtained a decree in original suit 224 of 1879 for the recovery of the mortgaged property conditionally on his discharging the mortgage debt; but the decree did not go on to declare that, if the condition was not fulfilled within a time limited, the suit should be dismissed and Panchanádayyan foreclosed. The rights of Panchanádayyan in the mortgaged property were sold by Panchanádayyan to the defendant No. 2 and by him to the respondent, who thereupon applied to the Court which passed the decree for redemption for leave to execute it. The Court refused the application as the decree had not been assigned to him. The respondent then instituted the present suit in which he prayed that it should be declared that he was entitled to execute the decree in original suit No. 224 of 1879, or that it should be ordered that the mortgaged property should be delivered to him on payment of the amount due on the mortgage. Before the trial of the suit three years had elapsed from the date of the decree in original suit No. 224 of 1879, and accordingly the Múnsif awarded the alternative relief claimed and the Appellate Court affirmed the decree.

In our judgment the relation on which the mortgagor and mortgagee stood to one another was not terminated by the decree. It was intended by the decree that it should be terminated on the happening of a certain event, which event has not occurred. The relation then still exists, and the right to redeem is inseparable from the relation so long as it exists. An unexecuted decree for partition would not alter the relation of the members of a joint family. The estate would still be joint and the right to obtain a partition would attach to it whenever a fresh demand for partition was made and refused.

We dismiss the appeal with costs.

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APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885.
April 17.

9 Mad. 103.
13 B. 216.
10 Bom. 308.
Mad. 422.
4 Cal. 912.

KARUPPAN AND OTHERS (DEFENDANTS), APPELLANTS,

and

RÁMÁSÁMI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 375—Compromise of suit—Consent withdrawn before decree.

By an agreement made in writing, before the hearing, the parties to a suit entered into a compromise by which the plaintiff agreed for consideration to withdraw the suit. When the case came on for hearing, plaintiff refused to fulfil his promise.

The defendant having produced the agreement, the Múnsif held that it must be enforced, and dismissed the suit.

On appeal the District Judge held that the agreement could not be treated as a compromise, as the plaintiff did not consent, and remanded the suit.

Held, that the agreement could be enforced—*Ruttonsey Lálji* v. *Pooribái* (I.L.R., 7 Bom., 304) approved.

THIS was an appeal against the decree of C. W. W. Martin, District Judge of Salem, reversing the decree of S. Manavá-láyyar, District Múnsif of Salem, in suit 280 of 1883.

The plaintiff, Rámásámi Goundan, sued the defendants, Karuppan and two others, to compel them to execute a conveyance of certain land which the defendants had sold and delivered to plaintiff.

The defendants pleaded that the matter in dispute had been settled out of Court after issue of summons, and produced a document stamped with an anna stamp purporting to be a receipt for Rs. 100, executed by plaintiff, stating that he had transferred the land to the defendants and that he undertook to have the suit dismissed by presenting a petition for withdrawal.

The plaintiff, admitting the genuineness of this document, objected, *inter alia*, that, as the consideration had not been paid, he was not bound by it.

The District Múnsif held that, as the money was placed in the

* Appeal against Order 31 of 1885.

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hands of a third party until plaintiff performed his part of the agreement, the agreement should be enforced, and dismissed the suit.

The District Judge reversed this decree and remanded the suit on the ground that, as both parties did not consent, the document could not be treated as a compromise of the suit.

The defendants appealed.

Rámásámi Mudalyar for appellants.

Sadágopácháryar for respondent.

The Court (Muttusámi Ayyar and Hutchins, JJ.) delivered the following

JUDGMENT :—The District Judge has declined to admit evidence of an agreement out of Court whereby the respondent agreed to withdraw his suit in consideration of a sum of Rs. 100 which is said to have been deposited for him with a third party. The question is whether an adjustment out of Court of a pending suit is binding on the parties, or whether either party is at liberty to withdraw from such adjustment at any time before it has been formally assented to in Court.

The question came before Mr. Justice Scott in *Ruttonsey Lálji v. Pooribái*,(1) and he held that no party was at liberty to withdraw from a compromise once unconditionally agreed to. It appears to us that this is the correct view. If a defendant satisfies the plaintiff by an actual payment before the final hearing, it could not be contended that he is not entitled to prove such satisfaction by the plaintiff's receipt if it is denied, and s. 375 puts an adjustment by any lawful agreement on the same footing as a satisfaction.

We set aside the Judge's decree and direct him to restore the appeal to his file and pass a fresh decree after such inquiry as may seem necessary.

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(1) I.L.R., 7 Bom., 304.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

1885. April 24.

10 Mad. 79, 117, 223, 322.
12 Do. 434.
13 Do. 480.
16 Do. 337.
15 All. 405.
17 Mad. 214.
20 Do. 130
27 Mad. 376
29 Mad. 395.
51. Mad 128

ITTIACHAN (DEFENDANT No. 1), APPELLANT,
and
VELAPPAN AND ANOTHER (PLAINTIFF'S REPRESENTATIVES), RESPONDENTS.*

SYED KUTTI AND ANOTHER (DEFENDANTS Nos. 3 AND 4), APPELLANTS,
and
KANNAN (PLAINTIFF No. 1), RESPONDENT.†

KANNACHI AND ANOTHER (PLAINTIFFS), APPELLANTS,
and
NÁRÁYANA AND ANOTHER (DEFENDANTS), RESPONDENTS.‡

VÍRAN ALI (DEFENDANT No. 6), APPELLANT,
and
KUNHAMAD AND OTHERS (PLAINTIFFS), RESPONDENTS.§

RÁMAN (PLAINTIFF), APPELLANT,
and
CHATHU AND OTHERS (DEFENDANTS), RESPONDENTS.||

RÁMÁ AND OTHERS, PETITIONERS,
and
KRISHNA, RESPONDENT.¶

KRISHNA, PETITIONER,
and
NANU AND ANOTHER, RESPONDENTS.**

Malabar Law—Karnavan, Decree against—Execution against tarwad property—Sale—Right of purchaser—Res judicata—Right of junior member of tarwad not impleaded to contest sales of tarwad property in execution of decree against karnavan sued as such.

When the karnavan of a Malabar tarwad has not been impleaded, as such, in a suit, and there is nothing on the face of the proceedings to show that it was

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* Second Appeal 443 of 1883.
† Second Appeal 900 of 1883.
‡ Second Appeal 431 of 1884.
§ Second Appeal 442 of 1884.
|| Second Appeal 564 of 1884.
¶ Civil Revision Petition 266 of 1884.
** Civil Revision Petition 279 of 1884.

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intended to implead him in his representative character, tarwad property cannot be attached and sold in execution of the decree, even though it is proved that the decree was obtained for a debt binding on the tarwad.

Although the property of a tarwad may be attached and sold in execution of a decree when the karnavan is sued as representative of the tarwad, members of the tarwad who are not parties to the proceedings and have not been represented in the manner prescribed by the Code of Civil Procedure are not estopped from showing that the debt for which the decree was passed was not binding on the tarwad.

Second Appeal No. 443 *of* 1883.

Appeal from the decree of E. N. Overbury, Acting District Judge of South Malabar, confirming the decree of N. Sarvóthama Ráu, dated 30th September 1882.

Mr. *Branson* and Mr. *Michell* for appellant.

Sankaran Náyar for respondents.

Second Appeal No. 900 *of* 1883.

Appeal from the decree of T. von D. Hardinge, Acting District Judge of North Malabar, reversing the decree of B. D'Rozario, District Múnsif of Pynád, dated 4th November 1880.

Mr. *Shephard* for appellant.

Sankaran Náyar for respondent.

Second Appeal No. 431 *of* 1884.

Appeal from the decree of C. Rámáchandráyyar, Subordinate Judge of South Malabar, reversing the decree of B. Kamaran Náyar, dated 21st June 1883.

Sankara Menon for appellants.

Sankaran Náyar for respondents.

Second Appeal No. 442 *of* 1884.

Appeal from the decree of T. von D. Hardinge, Acting District Judge of North Malabar, confirming the decree of A. C. Kannan Nambiar, District Múnsif of Kavai, dated 7th July 1883.

Srinivása Ráu for appellant.

Mr. *Branson* for respondents.

Second Appeal No. 564 *of* 1884.

Appeal from the decree of T. von D. Hardinge, Acting District Judge of North Malabar, confirming the decree of D. D'Cruz, District Múnsif of Chavasheri, dated 7th August 1883.

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ITTIACHAN v. VELAPPAN.

Anantan Náyar for appellant.

Sankaran Náyar for respondents.

Civil Revision Petition No. 266 *of* 1884.

Petition under s. 622 of the Code of Civil Procedure against the order of N. Sarvóthama Ráu, District Múnsif of Palgát, dated 25th March 1884.

Sankaran Náyar for petitioners.

Sadágopácháryar for respondents.

Civil Revision Petition No. 279 *of* 1884.

Petition under s. 622 of the Code of Civil Procedure against the order of N. Sarvóthama Ráu, District Múnsif of Palgát, dated 18th June 1884.

Mr. *Wedderburn* and *Sadágopácháryar* for petitioner.

Sankaran Náyar and *Gopálan Náyar* for respondents.

THESE cases were referred from time to time to a Full Bench for decision.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Full Bench (Turner, C.J., Kernan, Muttusámi Ayyar, Hutchins, and Brandt, JJ.).

JUDGMENT:—In these cases the question has been raised—under what circumstances a decree passed against a karnavan of a Malabar tarwad will be binding on the other members of the tarwad who may not have been made parties to the suit, so that a sale in execution will convey the rights of the tarwad in the property sold in execution to a purchaser?

The customary law of Malabar vesting in the senior male or karnavan the management of the family property, an error unfortunately crept into the procedure adopted by the Courts of Malabar, and it was considered not only that a karnavan might sue alone on behalf of the tarwad, but that he might be impleaded alone as representing the tarwad. Indeed, the practice seems to have gone further, and it has been supposed that a decree obtained against a person who filled the position of karnavan would bind the tarwad, although he was not impleaded as karnavan, and although there was nothing on the face of the record to show that it was the intention of the parties that he should be sued in a representative character. Similarly it has been the practice to

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treat a decree obtained against a person holding the position of karnavan as a decree against the tarwad, of which he was the managing member, and to bring to sale in execution of it tarwad properties, although there was nothing on the face of the proceedings to indicate the liability of the tarwad or that the judgment-debtor had been impleaded as representing it. In *Kombi* v. *Lakshmi*(1) this Court pointed out that, in order to bind the members of a tarwad, the proper procedure was to implead all of them, though in cases in which the members of the tarwad were numerous, advantage might be taken of the provisions of the Code of Civil Procedure which enabled the plaintiff to bring before the Court certain persons to represent themselves and others, having a similar interest in the subject of the litigation. It is very possible that the error in procedure to which we have adverted had its origin in the inconvenience of impleading so numerous a body as frequently constitutes a Malabar tarwad, of whom some may be minors and some may reside at a considerable distance from the tarwad house. Nevertheless, when it is sought to bind persons by a decree or by an order made in execution of a decree, some grounds must be shown to justify the imposition of the obligation. Ordinarily no persons are bound by a decree who are not parties to the suit or proceedings, or who do not claim through or under persons who are parties to the suit or proceedings. The Privy Council has nevertheless recognised that, for certain purposes, the manager of a Hindú family sufficiently represents all the members of a family, if it appears on the face of the proceedings that he has been impleaded in that character.

This is no doubt a concession to the *inexperience* in pleading which attended the constitution of regularly organised Civil Courts in this country, and to the extent to which the ruling of the Privy Council in the case to which we have alluded (*Bissessur Lall Sahoo* v. *Maharajah Lachmessur Singh*(2)) authorises us to go, the circumstances of the Courts of Malabar appear to us to require us to go. But we cannot go further. No doubt it inflicts some hardship on a plaintiff who has obtained a decree against a person holding the position of a karnavan, in the belief that he has thereby secured a remedy against the tarwad, to find that his

(1) I.L.R., 5 Mad., 201. (2) L.R., 6 I.A., 237.

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ITTIACHAN v. VELAPPAN.

decree is imperfect: it is a greater hardship on a purchaser at an auction sale held in execution of a decree of Court that he should find that the sale is not binding on the tarwad. But inasmuch as the recent amendment of the Procedure Code has declared that a sale in execution may be set aside where nothing passes by it, and in a sale in execution of a decree passed against a person who is the karnavan, but is not impleaded in that character, no interest in tarwad property could be conveyed, the purchaser will not be greatly injured. On the other hand, it would be extremely hard to hold that the members of a tarwad are bound by a decree or sale where they are not parties to the suit or proceedings, and where there is nothing to show that it was the intention of the person who procured the decree or sale to seek any remedy against them or to affect their interests. For this reason it was held in *Hájí* v. *Atharáman*(1) that where a suit was brought against a person who was karnavan of a tarwad but who was not impleaded as such, nor was the debt alleged to be a tarwad debt, a sale in execution of the decree would not bind tarwad property. It must of course be understood that where the members of a tarwad are not parties to the proceedings and have not been represented in the manner prescribed by the Code, they are not estopped from showing that the debt was not a tarwad debt.

We propose then to examine the circumstances of the several cases referred to separately.

Second Appeal No. 443 *of* 1883.

In second appeal 443 of 1883 the plaintiff sues for a declaration that certain tarwad property, which he has attached in execution of a decree obtained by him in suit No. 633 of 1875, but which had been released from attachment on the objections of defendants Nos. 1 and 2, is liable to be brought to sale for satisfaction of his decree. It appears that defendant No. 3 was the karnavan of the tarwad, and that in 1865-66 he purchased several pieces of land at Court sales and expended on the purchase about Rs. 9,000. Among the lands so purchased are the lands of which the plaintiff claims the sales. Although it is said that the lands were purchased with borrowed monies, it is found by the Court

(1) I.L.R., 7 Mad., 514.

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of First Instance and the Appellate Court that the lands in suit were purchased for, and are the property of, the tarwad.

ITTIACHAN v. VELAPPAN.

We have then to consider whether the decree obtained by the plaintiff confers on him a right to bring the property to sale.

That decree was passed on a bond executed by defendant No. 3 in November 1872. The bond purports to have been executed for the sum due on settlement of account, and the plaintiff's case is that the account related to a bond debt created by the defendant No. 3 in 1867, when he borrowed Rs. 1,000 on the representation that he wanted the money to deposit it in Court in respect of a purchase of land at a Court sale: and it appears that about that time defendant No. 3 made such a purchase, and the Court of First Instance and Appeal have found it is sufficiently proved that the land was bought with the money borrowed. The defendants Nos. 1 and 2 contended that they could not be bound by the acts of defendant No. 3 in November 1872, because they had given notice in the gazette that they revoked any authority defendant No. 3 enjoyed to manage the tarwad properties and they had already instituted a suit No. 120 of 1872 for his removal from the office of karnavan. That suit was eventually withdrawn on a compromise, and it was not until 1875 that defendants Nos. 1 and 2 eventually obtained a decree in suit 263 of 1875 for the removal of defendant No. 3 from his office. The Courts of First Instance and Appeal have held that these circumstances were insufficient to invalidate the obligation created by defendant No. 3 to the plaintiff as regards defendants Nos. 1 and 2, and finding that the plaintiff lent his money in good faith, and that the money was used for the benefit of the tarwad, they have held that the plaintiff is entitled to bring to sale tarwad property to satisfy the decree he had obtained in original suit 633 of 1875 against defendant No. 3.

On appeal it is urged that defendant No. 3 was not impleaded in that suit as karnavan, and that there is nothing on the face of the proceedings to show that he was impleaded in a representative character.

This cannot be controverted. In reference to the observations we have made we must hold that the property of the tarwad cannot be made liable to the decree, and reversing the decrees of the Courts below, we must dismiss this suit, but, under the circumstances, without costs.

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ITTIACHAN v. VELAPPAN.

Second Appeal No. 900 *of* 1883.

In second appeal 900 plaintiffs and defendants Nos. 1 and 2 were members of a tarwad, and they have sued for a decree declaring that certain tarwad properties mentioned in the plaint are not liable to sale in execution of decrees obtained in Small Cause Court case 1167 of 1880 against defendants Nos. 1 and 2 by defendant No. 3, and in Small Cause Court case No. 980 of 1879 by defendant No. 4 against defendant No. 1.

Small Cause Court case 1167 of 1880 was brought against defendant No. 1, who was karnavan, but was not so described in the suit, and against defendant No. 2, another member of the tarwad who was described as anandravan.

It is shown that the bond on which the suit was brought was executed to secure a loan obtained by defendants Nos. 1 and 2 for reconstructing the tarwad house which had been destroyed by fire, and that it was written by another anandravan who is dead.

The circumstance that defendant No. 2 was impleaded as anandravan appears to show that it was the intention of the defendant No. 3 to implead the defendants Nos. 1 and 2 as representing in that suit the other members of the tarwad, and agreeably to the principle we have laid down we consider it may be held the tarwad properties are liable to sale in satisfaction of the claim.

In Small Cause Court case 980 of 1879 the present defendant No. 4 sued defendant No. 1, but did not describe him as karnavan, and there is nothing in the proceedings in that suit which are produced to us to show that the defendant was impleaded as karnavan or sued for a tarwad debt as the representative of the tarwad.

The debt was contracted for the rent of two parambas (gardens) which the defendant No. 1 held on verumpátam (simple lease).

We must hold that the tarwad properties are not liable to sale in execution of this decree.

The appeal in so far as it relates to the defendant No. 3 will be decreed and the suit dismissed with proportionate costs in all Courts. In respect of the claim of the defendant No. 4 the appeal will be dismissed and the decree of the Lower Appellate Court affirmed but without costs.

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Second Appeal No. 431 *of* 1884.

In second appeal 431 of 1884 the plaintiffs and defendants Nos. 2 and 3 are members of a tarwad. The interest of the tarwad in certain property was mortgaged by the plaintiffs and defendants Nos. 2 and 3 jointly on kánam for Rs. 2,478 to defendant No. 1, who held possession as mortgagee, but granted a lease to the karnavan at a rent equalling the interest he was entitled to receive on the kánam.

The interest was allowed to fall into arrears, and the karnavan in whose name the lease was granted died, whereupon defendant No. 1 instituted a suit 553 of 1877 against defendants Nos. 2 and 3 and the plaintiffs, and recovered judgment on their karnavan's engagement to pay rent.

In liquidation of the judgment-debt the plaintiffs and defendants Nos. 2 and 3 executed a deed of further charge on the properties, and defendants Nos. 2 and 3, who had become managers of the tarwad property, executed another engagement to pay rent equal to the interest on the original kánam and further charge. Again default was made, and defendant No. 1 brought original suit 564 of 1880 against defendants Nos. 2 and 3 on the engagement made by them, and obtained a decree.

It may be observed that defendant No. 2 was the karnavan and the defendant No. 3 the senior lady of the family, and it has been stated, and probably correctly, that she took part in the execution of the rent engagement, and it is argued that she was included in the suit 564 of 1880 as a representative of the family.

Both the Courts have held that the debt was, in fact, a tarwad debt contracted for the benefit of the tarwad, but in view of the fact that the plaintiffs were not parties to original suit 564 of 1880, the Múnsif held that the tarwad property cannot be brought to sale, but the Appellate Court reversed that decree. There is nothing on the face of the decree to show that the defendants Nos. 2 and 3 were sued as representing the tarwad: on the contrary, it appears they were sued on their personal undertaking. The decree of the Appellate Court is reversed and that of the Múnsif restored but without costs.

Second Appeal No. 442 *of* 1884.

In second appeal 442 of 1884 the plaintiffs sue for the cancelment of sale of a paramba and a house in execution of the decree

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ITTIACHAN v. VELAPPAN.

in Small Cause Court suit 768 of 1881 obtained by the defendant No. 6 against defendants Nos. 1 to 5, the karnavan and the senior anandravans of the plaintiff's tarwad.

It has been found by the Appellate Court, and for sufficient reasons, that the debt was in fact a tarwad debt, viz., a debt contracted by the defendants 1 to 5 for interest on a kánam which they had executed to the defendant No. 6 to discharge a debt previously incurred by them in the purchase of certain properties for the family and for other family purposes.

It appears from the plaint that, although the defendant No. 1 was not described as karnavan, the other four defendants were described as anandravans.

We consider it sufficiently appears that they were sued as representatives of the family, and that the sale ought not to be set aside.

The appeal must be decreed, and the decrees of the Courts below reversed and the suit dismissed with costs in all Courts.

Second Appeal No. 564 *of* 1884.

In second appeal 564 of 1884 the plaintiff sues to obtain a declaration that certain tarwad property attached by him in execution of decree in original suit 429 of 1879, but released on the application of the defendants Nos. 2 to 6 is liable to sale for the satisfaction of the decree.

It appears that in 1874 defendant No. 1, who is the managing member of the tarwad to which he and the other defendants belong, borrowed Rs. 100 from the plaintiff and executed a bond pledging the family property as security for the repayment of the loan. It is alleged that the object of the loan was to make a payment to induce a former karnavan of the family to retire from its management, because he was injuring the interest of the family by mismanagement. Both the Courts find that there is no evidence that the former karnavan was guilty of mismanagement, and they have come to the conclusion that the object of defendant No. 1 in inducing the late karnavan to retire was that he himself might secure the position of karnavan.

It does not appear that the suit was brought against defendant No. 1 in his representative character, nor that the debt was a debt

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created for any necessity binding on the family. The tarwad property is not liable to sale. ITTIACHAN v. VELAPPAN.

The appeal fails and is dismissed with costs.

Civil Revision Petition No. 279 *of* 1884.

In this case a decree had been obtained against a person who was the karnavan of a tarwad, but who had not been impleaded as karnavan or otherwise as representing the family, nor is there anything on the face of the proceedings to show that the decree was obtained against the defendant as representative.

The tarwad property was attached in execution of the decree, and certain of the anandravans objected to the attachment, but their objections were overruled. Two other anandravans then presented an objection, and the Múnsif, having his attention called to the case of *Venkata* v. *Kaveri*,(1) held that the family property was not liable and released the attachment.

In our judgment he was right in so doing, and even if we had had power to interfere under s. 622, Civil Procedure Code, we must have supported the order. The application is dismissed with costs.

Civil Revision Petition No. 266 *of* 1884.

The application in civil revision petition 266 of 1884 is presented against an order disallowing the objection of the anandravans in the case mentioned in civil revision petition 279. We have no power to interfere under s. 622, Civil Procedure Code —the petitioner's remedy is by suit. The application is dismissed but without costs.

(1) I.L.R., 7 Mad., 201.

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APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885.
April 17.

11 Mad. 220.
17 Dc 412.

SANJIVI (PETITIONER),

and

RÁMASÁMI (RESPONDENT).*

Civil Procedure Code, ss. 244, 583, 622—*Claim for rateable distribution by creditor rejected—Sum detained in Court, pending application to High Court—Application rejected—Interest on sum detained claimed in execution—Procedure.*

In execution of a decree by R, S, another creditor, claimed a rateable share of the proceeds realized. His claim was rejected. Pending an application to the High Court under s. 622 of the Code of Civil Procedure to set aside this order, the share claimed by S was detained in Court at his request. The High Court rejected the application of S, and R took out execution for the costs incurred therein, and for interest on the sum detained in Court at the request of S:

Held that the interest could not be awarded to R in execution of the decree for costs.

THIS was a petition under s. 622 of the Code of Civil Procedure against an order of H. T. Knox, District Judge of North Arcot, dated 21st January 1885.

In execution of the decree in suit No. 2 of 1879 in the District Court of North Arcot, Kotha Sanjivi Chetti, the petitioner, claimed to be entitled, as a creditor of the judgment-debtor, to a rateable distribution of the proceeds realized in execution of the decree by the respondent, Kotha Rámasámi Chetti. His claim was rejected, but pending an application to the High Court under s. 622 of the Code of Civil Procedure to set aside the order rejecting his claim, the rateable share claimed by Sanjivi was detained in Court at his request. The High Court having rejected the application for revision, Rámásámi took out execution for Rs. 38-11-0, the costs awarded to him in the matter of the petition to the High Court by Sanjivi, and for Rs. 216, interest on the amount detained in Court at Sanjivi's request pending his application to the High Court. Sanjivi tendered Rs. 38-11-0, but objected to pay the interest claimed.

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* Civil Revision Petition 81 of 1885.

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The District Judge held that the claim was in substance a claim for mesne profits, and that it could and ought to be decided in execution under clause (c) of s. 244 of the Code of Civil Procedure, and that as Rámásámi had been kept out of his money by the action of Sanjivi, he was entitled to interest.

Sádagopáchár̀yar for petitioner.

Bháshyam Ayyangár for respondent.

The Court (Muttusámi Ayyar and Hutchins, JJ.) delivered the following

JUDGMENT:—The share which would have fallen to the petitioner, if a rateable distribution had been allowed, was retained in deposit on his application, pending his revision petition to this Court, asking that such a distribution might be ordered. That revision petition, however, was dismissed and the money has been paid out to the respondent—the question is whether the Judge had power by a summary order to award interest on the amount for the time it was retained in Court at petitioner's request. He had no jurisdiction under s. 244, for the parties are competing creditors and not parties to any suit. Section 583 has no application, for the High Court simply dismissed the revision petition. The order under which the money was retained was unconditional, and it was not competent to the Judge to add to it or to direct, when the stop order was withdrawn and the money paid, that it should be paid with interest. The respondent's remedy, if any, would be by regular suit.

We set aside so much of the District Judge's order as awards interest and direct the respondent to pay the costs of this application.

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23 mad. 32
6 cwn. 180.
33 cal. 912.
43 Mad 487
51. Mad. 128

1885.
March 4.
April 25.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Hutchins.

THÁNAKOTI AND OTHERS (PLAINTIFFS), APPELLANTS,

and

MUNIAPPA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 13, explanation 5.

In 1881 A sued B, C, and others for damages for the loss of his crops by the diversion of a water channel by the defendants. A claimed a right, common to himself and other raiyats of his village, to use the water during the day time under an arrangement by which B, C, and the other defendants in the suit were entitled to use the water during the night time. The suit was dismissed.

In 1882 A and four other raiyats, not parties to the former suit, sued B, C, and thirteen others, not parties to the former suit, for a decree declaring that the plaintiffs were entitled to the exclusive use of the water in the channel by day.

The Lower Courts held that the suit was barred by s. 13 of the Code of Civil Procedure:

Held, that as between the plaintiffs other than A and the defendants, and as between A and the defendants other than B and C, the suit was not barred by s. 13 of the Code of Civil Procedure.

THIS was an appeal from the decree of C. W. W. Martin, District Judge of Salem, confirming the decree of H. Krishna Ráu, District Múnsif of Dharmapúri, in suit 476 of 1882.

The facts necessary for the purpose of this report appear from the judgments of the Court (Kernan and Hutchins, JJ.).

Bháshyam Ayyangár and *Kaliána Rámáyyar* for appellants.

Rámáchandra Ráu Saheb for respondents.

HUTCHINS, J.—This is a suit brought by five raiyats of Chandrapúram to establish an arrangement whereby the water of a certain channel is reserved for the nanjai lands of Chandrapúram during the twelve hours of the day, but for the gardens of Chandrapúram and another village during the night. The plaint alleges that since June 1881 the defendants have shut off the waters of the channel from both nanjai and garden lands of Chandrapúram and have been using them exclusively for the garden lands of the other village and of a third village named Agaram. Both the

* Second Appeal 998 of 1884.

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Courts below have found that the claim is *res judicata* by the decree of the same Múnsif in original suit No. 82 of 1881.

That was a suit brought by the present plaintiff No. 3 against two of the present defendants and others to recover damages on account of his crops having withered in consequence of the present defendants Nos. 1 and 13 and the other defendants in that case diverting the channel now in question in the day time of the 5th July 1880, when under the alleged arrangement it was the turn of the then plaintiff to have the water. The two defendants who are defendants in this case, denied the arrangement, and contended that the village of Agaram was also entitled to the use of the channel by day as well as by night. The first issue framed was whether the then plaintiff was entitled to the water during day time to the exclusion of the defendants. This issue was found against the plaintiff and his suit was dismissed.

There is no doubt that as between him, that is the present plaintiff No. 3, and the defendants arrayed against him in that suit, including the present defendants Nos. 1 and 13, the finding of that issue is *res judicata* and conclusive. But as between the other plaintiffs and the defendants, even including defendants Nos. 1 and 13, the finding will not be *res judicata*, unless it is shown that those plaintiffs were sufficiently represented by plaintiff No. 3 and the other defendants by Nos. 1 and 13.

The former suit was brought by plaintiff No. 3 personally for damages caused to himself by the loss of his own individual crop. It was brought after s. 30 of the Civil Procedure Code came into force, but it is not pretended that there was any permission of the Court to enable the then plaintiff to sue, or the then defendants to be sued, on behalf of other parties interested in establishing or denying the same arrangement, or that there was any notice of the institution of the suit to parties so interested.

The Múnsif relies on *explanation* 5 to s. 13 of the Code, but the then plaintiff, although he alleged a private right which he claimed to have in common with others, did not claim it on behalf of those others, but sued for damages caused to himself individually by the infraction of that common right. Neither with reference to s. 30, nor under the law as it existed before the amendment of the Code, was the suit a representative suit brought by the then plaintiff on behalf of himself and others interested.

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THÁNAKOTI v. MUNIAPPA.

The District Judge on the other hand relies on the words "or any of them" in s. 13. "No Court shall try an issue decided in a former suit between the same parties, or between parties under whom they *or any of them* claimed." We have already shown that this is not a suit between the same parties, although one of the plaintiffs was a party to the other suit, and none of these plaintiffs claim under him; and it seems quite clear, "parties under whom they or any of them claim," is to be construed with reference to the preceding words "the same parties," so as to include the representatives of any in the term "parties." On the District Judge's interpretation it would be open to a plaintiff to estop all his opponents by joining as defendant the representative of one against whose predecessor he had obtained a decree.

The dismissal of the suit as *res judicata* is wrong, and we set aside the decree of the Lower Appellate Court and remand the suit for a decision on the merits. The costs of this appeal will abide and follow the result.

KERNAN, J.—As between Vedanta Ayyangár, the plaintiff No. 3 (plaintiff in suit 82 of 1881), and such of the defendants to the latter suit as are defendants in this suit, the plea of *res judicata* is a bar to plaintiff's claim. It makes no matter that in this suit the plaintiff No. 3 asks for a declaration not asked for in the former suit. He could have asked for it in the former suit if his claim was good. The matter in issue in this suit and in the former suit is directly and substantially the same in respect of plaintiff No. 3, and the defendants to this suit who were defendants to suit No. 82 of 1881. As between those parties, s. 26 will apply, and this suit may be dismissed as between those parties.

But when the record is so far cleared there still remain for decision rights not yet tried as between all the plaintiffs and such of the defendants as were not defendants in the former suit, and as between all the plaintiffs, except No. 3, and all the defendants in the suit.

These rights have not been determined, the Courts below having disposed of the case upon an erroneous view of the construction of s. 13, *explanation* 5. Both Courts decided that because plaintiff No. 3 claimed a right in common with the rest of the plaintiffs—that is, because this right put forward by the plaintiff

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No. 3 was, in suit No. 82 of 1881, held to be unfounded—therefore, the other plaintiffs in this suit are barred from bringing this suit. THÁNAKOTI v. MUNIAPPA.

Now in suit 82 of 1881 plaintiff No. 3 did not put forward any claim as being claimed in common with the other plaintiffs. No doubt he stated that he was one of the villagers, but his claim was made exclusively for injury done to himself. His claim to the right of water was plainly a claim in common with other villagers, but he did not put forward their rights, though, if he succeeded, they would have probably been benefited. Now, unless the other plaintiffs were aware of the suit of plaintiff No. 3 and authorized him to make the claim for them (of which there is neither allegation nor evidence), plaintiff No. 3 would have had no authority to claim on their behalf so as to bind them from afterwards bringing their own suit. One party having a right in common with others is not at liberty or authorized to sue in his own name to establish the right of the others except by their authority. *Explanation* 5 must be read with the provisions of s. 30 and the principles to be found in that section. If that section had been followed, which it was not, then the other plaintiffs would be bound.

The words "any of them" in s. 13 do not affect the case. Those words refer to any of the parties claiming under any party bound by the former proceeding.

As to limitation, if plaintiffs' claims are good, there may have been a new obstruction or interference with their rights in 1881 and afterwards up to the filing of the suit. Therefore this question of limitation must be tried. The decrees of the Múnsif and of the Lower Appellate Court are reversed and the case remanded for trial, it having been disposed of on a preliminary point.

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APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885.
March 5, 19.

LAKSHMAKKÁ AND ANOTHER (DEFENDANTS),

and

BÁLI (PLAINTIFF).*

Regulation IV of 1816—*Village Múnsif—Jurisdiction—Power to transfer suits.*

In a suit under Regulation IV of 1816, the defendant having objected to the Village Múnsif trying the suit on the ground of personal hostility, the Múnsif transferred the suit to another Village Múnsif :

Held that this transfer was illegal.

Per HUTCHINS, J.

Semble :—In such a case the Village Múnsif should report the facts to the District Court, and the District Judge should transfer the case for trial to another Village Múnsif.

THESE cases were referred to the High Court by W. F. Grahame, District Judge of Cuddapah.

The facts necessary for the purpose of this report appear from the judgment of the High Court (Muttusámi Ayyar and Hutchins, JJ.).

Srirangáchâryar for plaintiff.

Defendants were not represented.

HUTCHINS, J.—In these cases one Báli Reddi sued two persons, Lakshmakká and Rámásámi, respectively, for Rs. 18, being the value of manure agreed by them to be delivered in respect of certain houses said to have been built on the plaintiff's land. The Village Múnsif gave judgment for Rs. 12 in each case. The District Judge has referred the decrees as illegal on the ground that, although there is no evidence that the Múnsif acted with such corruption or gross partiality as would entitle the District Court to interfere under s. 29, Regulation IV of 1816, the property which the Múnsif "thought fit to divide into two parcels, each worth Rs. 18, is really one," and the splitting of the claim was in order to clutch a jurisdiction which he did not really possess.

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* Civil Revision Cases 397 and 398 of 1884.

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On referring to the pleadings I find a separate contract alleged with regard to each defendant, and that neither defendant set up the plea which has now been raised before the District Judge. The evidence taken by the Village Múnsif shows that the two defendants between them have three houses, and whether these are held by them jointly or severally, the objection that the two suits were in respect of the same house cannot be raised now, nor is there anything to support the statement that the Múnsif thought fit to divide the property.

There is, however, an entirely different ground for holding that the Múnsif had no jurisdiction. The parties reside within the jurisdiction of the Village Múnsif of Mamillapalle, before whom the suits were originally instituted. The suits were transferred by him to the neighbouring Múnsif of Utkúr, and it is the Múnsif of Utkúr who has passed the decrees. The transfer is said to have been made by an endorsement of the Múnsif of Mamillapalle. The reason for the transfer does not appear; but it was not because the Múnsif was himself a party: probably it was because the defendants in their written statements objected to his trying the cases himself, as he was their enemy.

Section 5 of the Regulation empowers Village Múnsifs to try suits the value of which does not exceed Rs 10, and this limit has since been raised to Rs. 20. Section 8 prohibits a Village Múnsif from taking cognizance of a suit against any person or persons not actually resident within his jurisdiction. Section 7 further forbids his trying any suit in which he himself or any of his immediate servants is personally interested. Section 26 provides that suits in which the Village Múnsif is a party shall be tried by the Múnsif of another village or by any competent authority.

I am disposed to think that s. 26 does not operate to give the Múnsif who has jurisdiction power to transfer a suit to another Múnsif: if it did, it would practically give one of the parties to the suit the right to choose the person by whom his case shall be determined: it is admitted by both these Múnsifs that they are intimate friends. But even if s. 26 could by implication be held to confer such a power, it does not apply here for the simple reason that the Múnsif of Mamillapalle was not himself a party.

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LAKSHMAKKÁ v. BÁLI.

It seems to me, therefore, that the Múnsif of Utkúr had no jurisdiction, and that both the decrees must be set aside.

It is a question of some difficulty what course the Múnsif of Mamillapalle ought to have followed when he found the defendants objecting to his trying the claims against them on account of his personal hostility. I am inclined to think that, like any other Court possessing jurisdiction over the subject-matter, he should have reported the facts to the superior Court having power to say what ought to be done and to transfer suits, *i.e.*, to the District Court. It is true that nothing in the Procedure Code affects the jurisdiction or procedure of Village Múnsifs (s. 6), and that, therefore, the District Court's power to transfer such a suit under s. 25 might be questionable; but the power to select a tribunal is impliedly given to some one, and, as I hold that it cannot have been given to the Múnsif himself, it must be vested in the person contemplated in the Regulation as the Múnsif's official superior, *i.e.*, the District Judge. Any other interpretation must lead to an absurdity.

MUTTUSÁMI AYYAR, J.—I am also of opinion that the decrees which are referred to us as illegal must be set aside.

I come to this conclusion on the ground that the Village Múnsif who tried the suits had no jurisdiction to try them. The defendants did not reside within his jurisdiction, nor was the imputation of enmity between them and the Village Múnsif of Mamillapalle a ground upon which it was competent to him to transfer the suits to another Village Múnsif either under s. 26 or any other section of Regulation IV of 1816. I do not, however, think that it is necessary to consider for the purpose of this reference whether in a case properly falling under s. 26 the Village Múnsif of Mamillapalle would not be entitled to transfer the suit to another Village Múnsif, or whether the District Court might interfere to transfer a suit from one Village Múnsif to another when the defendant objects to the Múnsif of his own village trying it on the ground of personal hostility.

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APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

In re QUARME.*

1885.
July 10.

Civil Procedure Code, ss. 336, 341, 344, 349—*Judgment-debtor—Imprisonment—Discharge.*

12 Bom. 46.

Sections 336 and 349 of the Code of Civil Procedure, 1882, are applicable to judgment-debtors under arrest, but not committed to jail. A judgment-debtor committed to jail can only be discharged under s. 341.

THIS was a case stated under s. 617 of the Code of Civil Procedure by W. E. Clarke, Subordinate Judge, Nílgiris, in small cause suit No. 289 of 1884.

The statement of the case was as follows.

In small cause No. 289 of 1884, one Mr. E. A. Quarme being arrested in execution of the decree, and being unable to pay the decree amount, was sent to jail under s. 336 of the Code of Civil Procedure; he now seeks to be released on furnishing security, pending the hearing of an insolvency petition which he has filed.

My doubt is, whether I have the power to release a judgment-debtor who is undergoing imprisonment on his furnishing security, pending the determination of his insolvency petition.

It appears to me that, according to the Code, there are only two ways in which a judgment-debtor can obtain his release after *arrest*, and only one method by which he can obtain release after *imprisonment*. After being arrested he may be released on furnishing security under s. 336 or s. 349; but he can only be discharged from jail under s. 341. What makes me entertain a doubt as to this view being correct, however, is, that by s. 344 a judgment-debtor either *arrested* or *imprisoned* may apply to be declared an insolvent, and s. 349, which is contained in the same chapter as s. 344, allows him, if *arrested*, to be released on furnishing security, but apparently has purposely been silent as to what is to be done with regard to his release if he has been imprisoned and yet seeks

* Referred Case No. 5 of 1885.

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In re QUARME.

to be declared an insolvent. The practice in this Court, which has existed, as I am given to understand, before I had any connection with it, has been to release applicants for insolvency, although imprisoned, on their furnishing security; but now that my attention has been particularly directed to s. 349, I am of opinion that the practice hitherto prevailing is erroneous, the point is of considerable importance, and therefore I have ventured to seek a definite decision regarding it from the High Court. I would, therefore, respectfully solicit an answer to the following question:—

Whether when a judgment-debtor has once been imprisoned he can be released from jail on furnishing security after he has filed his insolvency petition under s. 345.

Counsel were not instructed.

The Court (Muttusámi Ayyar and Hutchins, JJ.) delivered the following

JUDGMENT:—There is no provision in the Code of Civil Procedure for releasing a judgment-debtor who has been imprisoned on security pending the disposal of his petition to be declared an insolvent. Sections 336 and 349 are applicable to judgment-debtors who are under arrest and not already committed to jail. When a debtor is imprisoned he can only be discharged under s. 341.

APPELLATE CIVIL.

Before Mr. Justice Brandt.

1885.
May 1.

26 Mad. 371.

In re NARISI AND OTHERS.*

Civil Procedure Code, s. 592—Pauper appeal—Application by party, not by pleader, necessary.

An application for leave to appeal *in formâ pauperis*, under s. 592 of the Code of Civil Procedure, must be made by the party in person, subject to the exemption contained in s. 404 of the Code of Civil Procedure.

THIS was an application for leave to appeal *in formâ pauperis* to the High Court from the decree of the District Court of Godávari in suit 17 of 1883.

The applicants, plaintiffs in the suit, minors, represented by

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* Civil Miscellaneous Petition 158 of 1885.

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their mother Subbamma, had brought the suit *in formâ pauperis* in the District Court. The application was presented by *Subba Ráu*, vakíl of the High Court, under a power-of-attorney executed by Subbamma, but was rejected in the Admission Court on the ground that it could not be presented by a vakíl.

In re NARISI.

The following judgment was delivered by

BRANDT, J.—The appeal is one which I should have admitted, as it is doubtful whether the District Judge has dealt properly with the suit, having regard to the issues framed.

But a question arises as to whether an application for leave to appeal *in formâ pauperis*, when not presented by the applicant in person, such applicant not being exempt from appearing in Court, can be entertained.

Section 592 of the Code provides that any person entitled to appeal, if unable to pay the fee required, "may, on presenting an application, accompanied by a memorandum of appeal, be allowed to appeal as a pauper, subject to the rules contained in chapters XXVI (relating to pauper suits) XLI, XLII, and XLIII (relating to appeals) in so far as those rules are applicable."

Section 404 in chapter XXVI provides that "notwithstanding anything contained in s. 36 (relating to recognized agents and pleaders) the application (to sue as a pauper) shall be made to the Court by the applicant in person," unless he is exempt under s. 640 or s. 641 from appearing in Court, in which case it may be presented, not by any pleader or vakíl, but "by a duly authorized agent who can answer all material questions relating to the application and who may be examined in the same manner as the party" might have been examined if he or she had appeared in person.

Now, although the same necessity for the personal appearance of the party may not, and probably does not, exist in the case of an appeal as exists at and before the proceedings prior to admission of a pauper's suit, and though it might be even preferable to have a vakíl of the Court to show that the decree appealed against is contrary to law, or otherwise erroneous or unjust, I cannot hold that this rule is not applicable to pauper appeals.

The Code of 1859 (s. 368) did not in terms require the application for leave to appeal as a pauper to be presented in person; it required the application "to be written and presented" within

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In re NARISI.

proper time; but in *Mussomut Bhugobutty's case* (1) it was held that this section read with the s. 301 relating to presentation of applications to sue as a pauper (which required the application to be presented in person) made it imperative that the application to appeal also should be presented in person.

Now the wording of the present Code is much more explicit. It in terms imports into the provisions of chapter XLIV the rules contained in chapter XXVI, and, moreover, expressly states in s. 404 in the latter chapter that s. 36 shall not apply in the case of suits *in formâ pauperis*, which was not clearly expressed in the Code of 1859.

I must then hold that this application cannot be admitted.

APPELLATE CIVIL.

Before Mr. Justice Kernan, Officiating Chief Justice, and Mr. Justice Hutchins.

1885. April 29. July 6.

10 Mad. 357. 17 — 20. 22 Bom. 642. 12 Mad 462

VELÁYUTHAN (DEFENDANT NO. 1), APPELLANT,

and

LAKSMANA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, 1859, *s.* 246—*Limitation Act*, 1871—*Estoppel.*

An order passed under s. 246 of the Code of Civil Procedure, 1859, rejecting a claim, after investigation, will, if not contested by suit by the claimant, estop him afterwards from pleading adverse possession at the date of the order in a suit brought to eject him by the decree-holder.

THIS was an appeal against the decree of A. J. Mangalam Pillai, Subordinate Judge of Madura (West), reversing the decree of A. Kuppusámi Ayyangár, Additional District Múnsif of Madura, in suit 11 of 1884.

The plaintiff, Laksmana Chetti, sued Veláyuthan Servai and ten others to recover certain land and mesne profits. The plaintiff alleged that the owner of the land, Laksmana Servai, mortgaged it to Karuppanan in 1872; that in execution of a decree obtained by plaintiff's brother against Karuppanan in suit 259 of 1875 the land was attached and the mortgagee's title bought by plaintiff's brother and delivery made in execution of the

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(1) 21 W.R., 308.

* Second Appeal 86 of 1885.

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decree in 1877; that in 1878 the plaintiff's brother bought the equity of redemption from the owner, and that the defendants trespassed on the land in 1881-82 and carried off the crops. It was further alleged that the father of defendant No. 1 had failed in suit 206 of 1876 to establish his title to the land, and that in suit 259 of 1875 aforesaid a claim made by the father of defendant No. 1 had been rejected under s. 246 of the Code of Civil Procedure, 1859. Defendant No. 1 denied the title of Laksmana Servai and the possession of Karuppanan, and alleged that he (defendant No. 1) and his ancestors had been in possession under a sale-deed since 1823.

The Múnsif found that the title of plaintiff and possession of Karuppanan were not proved, and that the mortgage alleged to have been executed by Karuppanan was collusive.

The Múnsif also found that the title by purchase in 1823, set up by defendant No. 1, was not proved, but that he and his ancestors had held possession for fifty years.

The suit was dismissed.

Plaintiff appealed.

The Subordinate Judge found that the plaintiff's title was proved, and ruled that the title of defendant No. 1 "must be held to be defunct" by reason of the decree in suit 206 of 1876, and by reason of the order rejecting the claim made by his father in suit 295 of 1875, inasmuch as no suit had been brought to set aside that order (which was passed on the 30th January 1877) under s. 246 of the Code of Civil Procedure, 1859.

Defendant No. 1 appealed to the High Court on the following grounds:—

(1) Upon the findings of fact in the case, the plaintiff's suit is clearly barred by limitation.

(2) The Subordinate Judge is wrong in holding that the decision in original suit No. 206 of 1876 is, *res judicata*, in favour of plaintiff in the present suit.

(3) The defence of the defendants, so far as it is based upon limitation, is unaffected by original suit No. 206 of 1876 and the order passed under s. 246 of the former Code of Civil Procedure on a claim preferred by defendant in execution proceedings in original suit No. 275 of 1875.

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VELÁYUTHAN v. LAKSHMANA.

(4) The said order under the former Code was passed when Act IX of 1871 was in force, and the defendants were not bound to bring a regular suit within one year from the date of such order, even assuming that such order was passed under s. 246.

(5) The said order was not passed under s. 246 after holding an investigation under the said section.

(6) The defendants being in possession, can rely upon their long possession as a bar to the plaintiff's suit, and it is not necessary for them to rely upon limitation, as a ground of positive title by extinguishment of plaintiff's title, if any.

(7) The Subordinate Judge has given no finding as to the alleged delivery of possession to plaintiff.

The facts necessary for the purpose of this report appear from the judgment of the Court (Kernan, Officiating C.J., and Hutchins, J.).

Bháshyam Ayyangár for appellant.

Hon. *Subramanya Ayyar* for respondent.

JUDGMENT.—The respondent was clearly entitled to recover, and the Subordinate Judge's decree is right, unless the appellant is entitled to set up his hostile possession for more than twelve years. If he can set up that plea, there will have to be a remand in order that the question whether he has so held possession may be determined.

The Subordinate Judge has found that the plea was precluded, first, by the former litigation of 1876, and secondly, by the order rejecting the appellant's claim in November 1876 which has not been contested by a regular suit within the statutory period.

On the first point, we think the Subordinate Judge is wrong. Original suit 206 of 1876 was brought by the appellant's father to obtain a declaration of his title to the lands in dispute. Two issues were framed, *viz.*, (1) whether the lands were the property of appellant's father; (2) in whose enjoyment were they, and for how long had they been so. As proof of title under the first issue, the appellant's father relied on a conveyance of 1823, but this was discredited by both the Courts. Upon the second issue the Múnsif found that appellant's father had been in possession from 1823 to 1872, when he was dispossessed under a process

obtained in a collusive suit, but that his enjoyment had been as a mortgagee, and that, having been out of possession at the time he instituted the suit, he was not entitled to a declaration of title. In appeal, the District Court declined to go into the question whether the appellant's father was not still in possession, holding that, even if still in possession, he had failed to prove his title and was not entitled to have a declaration made of his absolute ownership. It is evident that there was no adjudication of the question of possession, and that, so far as those decrees go, the appellant is not debarred from now setting up that he was then, and still is, and has for half a century been, in hostile possession. The only effect of those decrees is to estop the appellant from setting up that he then had *title* to the lands.

The second point is more difficult to decide. Before the Múnsif's decree in original suit 206 of 1876 was passed, the lands had been attached in the suit which the Múnsif eventually found to be a collusive suit, and appellant had put forward a claim under s. 246 of the Code of 1859, stating that the lands belonged to himself and were in his possession and that, as the judgment-debtor (an alleged mortgagee) had no right whatever to them, the attachment should be removed. The Múnsif held some inquiry into the matter, but eventually rejected the claim, finding, that by that time (13th January 1877) it had been disallowed by another Múnsif in original suit 206 above mentioned. The appellant has made no attempt as yet to get that order set aside. The property was sold and purchased by the respondent in July 1877, and the appeal against the decree in original suit 206 was dismissed in the following September.

Now it has been held by this Court in *B. Krishna Rau* v. *Lakshmana Shanbhogue* (1) that an order passed under s. 246, disallowing an objector's claim, amounts to a summary declaration of a want of title in the objector, and that such declaration becomes equivalent to a final adjudication against his right, unless he brings a regular suit to supersede the order by establishing his right. The case of *Badri Prasad* v. *Muhammad Yusuf* (2) is another authority to the same effect and we were also referred to *Krishnáji Vithal* v. *Bháskar Rangnáth.*(3) The defendant has not brought any suit to establish his right since his objection was

(1) I.L.R., 4 Mad., 307. (2) I.L.R., 1. All., 381. (3) I.L.R., 4 Bom., 611.

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VELAYUTHAN v. LAKSMANA.

disallowed, and if his appeal against the decree in original suit 206 can be regarded as such a suit, it failed. The order passed on his objection, not having been questioned by a regular suit, estops him now from setting up the same claim or objection in this suit, and it only becomes necessary to see what it was that he set up. He set up both a right and a present possession on his own account. He admits that he cannot now set up his right, but he contends that he can put forward his possession. His vakíl contended that, if at the time his claim was dismissed he had been twelve years in adverse possession—or if he had been at that time some years, say, ten or eleven years, in possession, and if he continued in possession after the dismissal of the claim a sufficient time to make up with his prior possession twelve years, then he would have a title by possession notwithstanding the order of dismissal. But the order of dismissal was an adjudication against the claimant and he cannot make any case relying on any possession in whole or in part prior to that order. The terms of s. 246 here become material. The claim is to be disallowed, if it appear to the satisfaction of the Court that the property was in possession of the judgment-debtor as his own, or of his tenants. The order was therefore an adjudication that the land was not in the appellant's possession, as he had asserted it was, and we feel constrained to hold that it is not now open to him to assert, in direct opposition to that declaration, that he was in possession.

Whether it is still open to the respondent to bring a suit to establish his right is a question which need not now be considered. In *B. Krishna Rau's case*, the purchaser had brought his suit within the year allowed to the objector and defendant, but it was nevertheless held that the latter could not plead his right, though he might have brought a suit himself to establish it.

The result is that the appeal must be dismissed, and, though it seems a very hard case, we are not prepared to say that costs should not follow the result according to the usual rule.

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17 Mad. 285.
20 Do. 365.
31 Bom 64

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885.
July 6.

RÁMAKRISHNAPPA (PLAINTIFF), APPELLANT,

and

ÁDINÁRÁYANA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 317—Benámi purchaser—Stranger to the transaction not affected.

In a suit by A against B and C to recover land, A alleged that B bought the land at a Court sale on his behalf. B did not contest the suit. C, who did not claim under B, pleaded that A could not recover by reason of the provisions of s. 317 of the Code of Civil Procedure:

Held, that s. 317 only enabled the certified purchaser and those claiming under him to avoid arrangements made with him in the nature of a trust, and was no bar to the suit.

THIS was an appeal against the decree of K. R. Krishna Menon, Subordinate Judge of Tinnevelly, reversing the decree of K. Rámáchandráyyar, District Múnsif of Srivaikantam, in suit 162 of 1882.

The plaintiff, Rámákrishnappa Náyak, sued the defendants, Ádinárâyana Pillai and seven others, to recover certain land and mesne profits.

The Múnsif decreed the claim.

On appeal, the Subordinate Judge reversed this decree.

The plaintiff appealed to the High Court.

Bháshyam Ayyangár and *Kaliána Rámayyar* for appellant.

Hon. *Subramanya Ayyar* for respondents.

For respondents it was contended, *inter alia*, that appellant could not recover by reason of s. 317 of the Code of Civil Procedure, inasmuch as in proving his title he had to rely on two purchases at Court sales which, he alleged, were made on his behalf by the certified purchasers therein, who were also defendants in the suit.

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* Second Appeal 142 of 1885.

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RÁMA-KRISHNAPPA v. ÁDINÁRÁYANA.

The Court (Muttusámi Áyyar and Hutchins, JJ.) delivered the following

JUDGMENT:—This second appeal arises from a suit which was instituted by the appellant to recover possession of the land in dispute from the respondents. It was stated in the plaint that the land in question formed part of a one-third share which belonged to Dalavai Kumarasámi Mudali and Abiramianni in the village of Ellanáyakampatti; that their tenants purchased the third share for Rs. 12,000 on the 5th October 1870, but that only four of the chief men were the ostensible purchasers; that out of the purchase money, the tenants contributed but Rs. 9,000; and that the leading men mentioned above borrowed Rs. 3,000 from one Tinnappa Chetti on the security of some karisal púnja, nanja, and sevval púnja lands. It was further alleged that, on default being made in the repayment of Rs. 3,000, the creditor put up the mortgaged property to sale in execution of the decree in original suit 18 of 1873 on the file of the Subordinate Court of Tinnevelly; that defendant No. 6 bought it for himself and the appellant and obtained possession; and that subsequently both the appellant and defendant No. 6 held possession. It was also asserted that they borrowed Rs. 1,575 from one Murugappa Chetti in connection with this purchase at the Court sale; that Murugappa Chetti obtained decrees against the appellant and defendant No. 6 for the debt due to him in original suits 204 of 1878 and 310 of 1877 on the files of the District Múnsifs of Tinnevelly and Srivaikuntam; that he transferred those decrees to the husband of defendant No. 7 and to defendant No. 8; that the land in suit together with some other land was sold in execution of the same; that in pursuance of an arrangement previously made with the appellant, the transferees of the decrees purchased the land at the Court sale, and made it over to the appellant on receipt from him of what was due to them under the decrees in their favour. After thus averring how he acquired an exclusive title to the land in dispute, the appellant alleged that respondents Nos. 1 and 2 prevented him in January 1881 from cutting the crop raised by him on a part of it; and that upon his application to the Magistracy for redress failing, the respondents illegally dispossessed him of the whole. It appears further that 110 chains of karisal púnja, 6 and odd kottais of nanja, and 4 and odd chains of sevval púnja were purchased from the Dalavai family;

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that out of this, 34 chains of karisal púnja, nanja, and sevval púnja were mortgaged to Tinnappa Chetti; that the four ostensible purchasers executed sale-deeds conveying the remainder of the land to the several tenants who contributed Rs. 9,000; and that the contribution was made only by those tenants who held karisal púnja in proportion to their several holdings. The appellant's case was that, according to the agreement under which the one-third share was purchased, the purchase money was to be apportioned only on 110 chains of karisal púnja and the sevval púnja and the nanja lands were not to be taken into account in assessing the price on the tenants, but they were to be distributed, on payment of the whole of purchase money, among such tenants as cultivated karisal púnja and in proportion to their several holdings, and that consequently those tenants who had no karisal púnja to cultivate had no interest in the purchase, and those who owned karisal púnja lost their right to the land in suit by the auction sale which was the result of their default in payment of the balance of the purchase money. The defendants Nos. 6 and 8 disclaimed all interest in the land in dispute and acknowledged the appellant's claim to it. Defendant No. 7 did not appear in the Court of First Instance, nor did she appeal to the District Court from the decree of the District Múnsif. These defendants are not, therefore, made parties to this second appeal.

The first five defendants, who are the respondents before us, resisted the claim. They contended that they had occupancy rights, and that the appellant was not entitled to eject them by virtue of his alleged right as purchaser. They alleged that the original agreement in regard to the nanja and sevval púnja was that the prior holders were to continue in possession, though the purchase money was to be contributed solely by the tenants who owned karisal púnja; that the tirva and swámibhogam due thereon were to be appropriated to the payment of the assessment or kattuguttagai due to Government on the one-third share to be purchased; and that the surplus or deficiency was to be divided among or contributed by the holders of karisal púnja. As to the balance of purchase money, Rs. 3,000, their contention was that out of 110 chains of karisal púnja, 22 chains were owned by the appellant and his people; that it is was agreed that Rs. 3,000 was to be a charge upon those chains of púnja land only, Rs. 9,000

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being contributed by those tenants who held 88 chains of karisal púnja; and that the Court sales on which the appellant relied were not binding on them—first, because they were the result of the appellant's default, and secondly, because the mortgage to Tinnappa Chetti was not authorized by the terms of the original agreement between the tenants and the four ostensible purchasers. They denied also that the appellant was ever in possession. Issues were raised both as to the title and possession set up by the appellant. The District Múnsif held that the appellant had no peaceful possession; and that the transfer to the appellant by process of Court was perhaps only symbolical. He decreed the claim however on the ground that the appellant was entitled to possession by virtue of his title as purchaser.

But on appeal, the Subordinate Judge considered that, whether the appellant had actual possession, and such possession was usurped by the respondents, was the only question he had to determine, and, concurring with the District Múnsif that the appellant had failed to prove the alleged dispossession, he reversed the decree of the District Múnsif and dismissed the suit with all costs.

The Subordinate Judge is clearly in error in supposing that the appellant chose to base his suit on an alleged wrongful dispossession. The appellant no doubt asserted that respondents unlawfully took possession in March 1881, but there is no ground for the inference that this was a possessory suit. Having regard to the averments in the plaint as to title, to the frame of the pleadings, and to the issues taken by the parties, we see no reason to doubt that the appellant relied also on his title in support of his claim to possession.

The learned pleader for the respondents themselves does not endeavour to support the decree under appeal on the ground suggested by the Subordinate Judge. But he contends first, that no ejectment will lie against the respondents who have an occupancy right, and secondly, that the appellant can acquire no valid title as a benámi purchaser under s. 317 of the Code of Civil Procedure. As to the first contention there was no distinct issue raised in regard to occupancy right and the Subordinate Judge has not recorded any finding upon it. Though in paragraph 10 of his judgment, the District Múnsif observes casually, while discussing the evidence of one Vadivelu Muruga Pillai, that in nineteen

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RÁMA-KRISHNAPPA v. ÁDINÁRÁ-YANA.

suits the tenants in the village were declared liable to be evicted, it is not clear that the respondents had their attention sufficiently directed to the question by a specific issue, or that they had an opportunity of producing all the evidence in their possession to establish their allegation. We think that, even if the contention is well founded, it would still be necessary to remit the case in order that a specific issue might be framed, and a definite finding recorded after hearing such evidence as the parties to the appeal might adduce.

As to the second contention, s. 317 does not render a benámi purchase at a Court sale void *ab initio*. It only provides that no suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person. It is true that, in the case before us, the appellant in making out his title has to rely on two benámi purchases, viz., the purchase alleged to have been made by defendant No. 6 for himself and the appellant in suit 18 of 1873, and the purchase alleged to have been made by defendant No. 8 and the husband of defendant No. 7 in pursuance of a previous arrangement made with the appellant. But it must be noted that defendants Nos. 6 and 8 disclaimed all interest in the land in suit and admitted the appellant's right, while defendant No. 7 did not appear and resist the claim in the Court of First Instance, and did not appeal from the decree of that Court in favour of the appellant. It must also be observed that the respondents do not claim under the defendants 6—8 or any of them. As we understand it, the effect of s. 317 can only be taken to be to enable certified purchasers and those claiming under them to avoid any arrangement made with them in regard to the purchase in the nature of a trust. We set aside the decree of the Subordinate Judge and remand the case for disposal with reference to the foregoing observations. The costs of the second appeal will be costs in the cause.

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36 Mad 364

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885.
April 15.
July 6.

19 All. L. 105.
46 Mad 782

SONÁCHALA (PLAINTIFF), APPELLANT,

and

MANIKA (DEFENDANT), RESPONDENT.*

Jurisdiction—Suit to eject trustee—Valuation—Specific Relief Act, s. 42.

By an agreement between S and M, members of the same Hindú family, it was arranged that certain immovable property dedicated to charitable uses by the family should be managed by M, subject to the supervision of S, and that M, should render accounts to S and observe certain other conditions. S sued M in the Court of the District Múnsif and prayed for a decree for the removal of M as manager and for the appointing of himself as manager of the property.

M objected that the Court had no jurisdiction, because the property exceeded in value the pecuniary limits of the jurisdiction of the District Múnsif's Court as fixed by s. 12 of the Madras Civil Courts Act, 1873:

Held, that S was not entitled to sue for the removal of M without praying for his ejectment from the property, and that, as the property exceeded in value Rs. 2,500, the District Múnsif had no jurisdiction.

THIS was an appeal from the decree of D. Buick, District Judge of North Arcot, confirming the decree of V. Subramanya Sastri, District Múnsif of Vellore, in suit 455 of 1883.

The facts necessary for the purpose of this report appear from the judgments of the Court (Muttusámi Ayyar and Hutchins, JJ.).

Sádagopácháryar for appellant.

Mr. *Subramanyam* for respondent.

MUTTUSÁMI AYYAR, J.—The appellant is the son of the respondent's paternal uncle. Their ancestors founded a choultry at Vellore and left it under the management of their family. In 1874 there was litigation in regard to the management, but it terminated in a compromise. The special regulations established by this compromise were (i) that respondent should continue in management, but subject to appellant's supervision; (ii) that respondent should keep up the choultry as it was without altering its form; (iii) that he should apply the income to such charitable purposes as are connected with the institution;

* Second Appeal 42 of 1885.

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(iv) that he should render accounts every year to the appellant; (v) that the surplus income, if any, should be allowed to accumulate and be invested in the joint names of the appellant and the respondent; and (vi) that if the respondent was guilty of any breach of duty, he and the appellant should nominate certain arbitrators and abide by their decision. The plaint stated that respondent infringed those regulations by altering the western verandah, the western hall, and the southern verandah of the choultry so as to convert them into shops, by applying to his own use the rent received for those shops, by not managing the charity well and misappropriating its income for his own benefit. It next recited that the appellant intended to institute a fresh suit in regard to the income which had been misappropriated, and that respondent was called upon, but without success, to nominate arbitrators. It then prayed for a decree for the respondent's removal from management, for the appellant's appointment as manager, and for the removal of the new buildings by the respondent, or for the payment by him of Rs. 20 to enable the appellant to remove them. The respondent pleaded, *inter alia*, that the appellant was bound to obtain the relief asked for in this suit by executing the decree in original suit 404 of 1874 on the file of the District Múnsif of Chittúr, and that the suit was, therefore, barred by s. 244 of the Code of Civil Procedure, and that by the terms of the decree in original suit 404 of 1874 the appellant was not entitled to institute this suit, but was entitled only to compel the respondent to submit to arbitration. At the first hearing he pleaded orally to the jurisdiction of the District Múnsif, and contended that the value of the choultry, and the endowment of which the appellant claimed to be appointed as manager, was over Rs. 3,000. He also traversed the averments in the plaint in so far as they imputed to him mismanagement, misappropriation and a dereliction of duty in violating the terms of the razinâma.

SONÁCHALA v. MANIKA.

As the appellant did not claim possession of the choultry and its endowment, another question raised for decision in this suit was, whether he was not debarred from asking for a declaration of his right to management. The District Múnsif held that the appellant was not entitled to a declaratory decree under s. 42 of the Specific Relief Act, that under the terms of the razinâma decree, the appellant was bound to demand specific performance of the

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SONÁCHALA v. MANIKA.

agreement to refer the matters in dispute to arbitration, and that he (District Múnsif) had no jurisdiction to entertain the suit inasmuch as the choultry and its endowment were over Rs. 2,500 in value. In appeal the Judge concurred with the District Múnsif that the appellant had no right to a mere declaration of his right of management.

It is urged in second appeal that none of the objections taken to the suit are well founded, and that the appellant is entitled to a decision on the merits. Our attention was also drawn to *Govindan Nambiár* v. *Krishnan Nambiár*.(1) The question referred in that case for the decision of the High Court was, whether a suit for deposing a karnavan from management and for appointing the plaintiff in his stead was governed, when the tarwad was possessed of movable and immovable property, by cl. 5 of s. 7 of the Court Fees Act in the case of immovable property, and by cl. 3 of that section in the case of movable property. The High Court decided that the claim for the removal of a karnavan was incapable of valuation and ought to be dealt with for purposes of Court Fees under s. 17, cl. 6 of the second schedule, and it observed that it would be erroneous to value such claim as if it were a claim for possession of land, for, the possession of the property is throughout in the tarwad and is not affected by a change in the person who fills the office of manager. In that case both the karnavan and the anandravan were beneficiaries, and in one sense, the possession of either was the possession of both, whereas in the case now before us neither the appellant nor the respondent is a beneficiary and the possession of the one cannot be treated as the possession of the other. Having regard to s. 3 of Act II of 1882, which is only declaratory of the prior state of the law as to the nature of a trust, a trustee must be taken in law to be the owner of trust property, but subject to an obligation annexed to his ownership and arising from a confidence reposed in him and accepted by him as such owner for the benefit of the beneficiary. A suit, therefore, for removing a trustee in possession and for appointing the plaintiff in his stead and placing him in possession of the trust property must be treated, for purposes of Court Fees, in the absence of a special provision of law, as a suit falling under s. 7 of the Court Fees Act. It may be that the obligation annexed to the nominal ownership renders the

(1) I.L.R., 4 Mad., 146.

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position of a trustee analogous to that of a manager or office-bearer, but it seems to me only to furnish a ground for assessing the appellant or the respondent personally with the costs of the litigation according as the suit is vexatious or well founded. In this view the appellant's omission to ask for possession, which he is bound to do if the respondent's misfeasance injures the interests of the charity as alleged by him, must be taken to be an attempt to evade the Stamp law and to eject the respondent by obtaining a declaration. The Judge is therefore right in refusing to make the declaration sought for in this suit in which possession of the trust property was not claimed, and in my judgment such refusal is in accordance with the views expressed by this Court in *Chocka-lingapeshana Naicker* v. *Achiyar*.(1) It is true that in the plaint there is no prayer for a mere declaratory decree, but on the other hand there is a prayer for some consequential relief, if not for possession, and that this circumstance affords colour for the contention that s. 42 of the Specific Relief Act has no application. But still the suit must be treated as one undervalued for evading the Stamp law and instituted to recover property of which the value is in excess of the jurisdiction of the District Múnsif. This second appeal must, therefore, fail and is dismissed with costs.

HUTCHINS, J.—The Courts below have erroneously described the suit as one for a mere declaration brought under s. 42 of the Specific Relief Act. It is a suit for the removal of a manager, for the appointment of plaintiff as manager, for the removal of new buildings and so forth. I agree, however, that the plaintiff was not entitled to ask for the removal of the defendant and his own recognition as manager without adding a prayer for the defendant's ejectment from the property, which was certainly in the defendant's possession as against and exclusive of the plaintiff under the terms of the agreement between them.

I am also of opinion for the same reason that the suit must be valued according to the value of the property, and as it is admitted that the value of the property exceeds Rs. 2,500, the suit was improperly brought in the Múnsif's Court. The second appeal must, therefore, be dismissed with costs.

(1) I.L.R., 1 Mad., 40.

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PRIVY COUNCIL.

P.C.*
1885.
February 25.

PITTAPÚR RÁJÁ (DEFENDANT'S REPRESENTATIVE), APPELLANT,

and

SURIYA RÁU AND OTHERS (PLAINTIFFS), RESPONDENTS.

[On appeal from the High Court at Madras.]

Civil Procedure Code, 1859, *s.* 7—*Separate causes of action.*

Section 7 of Act VIII of 1859 required that every suit should include the whole of the claim arising out of the cause of action, meaning the whole of the claim arising out of the cause of action upon which the suit was brought, not that every suit should include every cause of action, or every claim, which the plaintiff had against the defendant.

Accordingly, where a plaintiff had sued to obtain his share of an estate in land, in consequence of having been wrongfully dispossessed by the defendant, whom he afterwards in the present suit sued for his share of personal property, being entitled to both under a will, it was *held* that the subsequent suit was not barred by reason of the non-claim in the prior one. The claim in respect of the personalty had not arisen out of the cause of action which existed in consequence of the wrongful dispossession; the case was not like one of the conversion of several things; and the causes of action were distinct—*Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*(1) referred to.

APPEAL from a decree (19th March 1880) of the High Court, modifying a decree (26th February 1876) of the District Judge of Godávari.

The question raised by this appeal was whether a suit for a share in money, jewels and other personal property brought by the respondents in 1875 against a defendant (now represented by the appellant), against whom they had obtained a decree in 1874, in respect of a mitta, of which they alleged themselves to have been dispossessed by the defendant, was barred by the operation of s. 7 of Act VIII of 1859,(2) the plaintiffs' title to both having originated in the same way.

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* *Present*: LORD BLACKBURN, SIR B. PEACOCK, SIR R. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) 11 M.I.A., 553.

(2) That section enacted as follows:—"Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished, or omitted, shall not afterwards be entertained."

See the corresponding enactments in X of 1877, s. 43, and XIV of 1882, s. 43.

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Rájá Niladri Ráu of Pittapúr died in the year 1828, leaving a widow, Bhávayyammá, and two sons, Rájá Ráu Venkata Surya and Rájá Kumara Mahipati Venkata Ráu, since deceased, leaving issue; he also left a daughter, Vellanki Lakshmi. The sons of the younger of the two brothers above-named were plaintiffs and respondents on this record; and their aunt, Vellanki Lakshmi, was originally the defendant. She, however, having died in June 1883, while this appeal was pending, was represented, on revivor, by Gangádhara Rámá Ráu, titular Rájá of Pittapúr, the son of Rájá Venkata Surya, the elder of the above brothers.

Bhávayyammá in 1835, after her husband's death, purchased a mitta named Palivéla; and in 1841 another mitta named Virávaram. Before her death, which occurred in 1870, she made her will, leaving Virávaram to the present plaintiffs and Palivéla to Vellanki Lakshmi. She also directed that her personal property should be divided into two parts, giving one share to the former and the other to the latter.

After her death the plaintiffs applied for the registration of the mitta of Virávaram in their names under Regulation XXV of 1802, but they failed, Vellanki Lakshmi obtaining registration in her name on the 8th July 1872. The plaintiffs in the same year instituted a suit to set aside the registration and to obtain possession of the mitta, obtaining a decree which was maintained by the High Court on 16th July 1874.

On the 14th May 1875, the plaintiffs instituted this suit, praying an account of money, jewels, and other property, which had belonged to Bhávayyammá.

The defence was that the suit was barred under s. 7 of Act VIII of 1859, by reason of the property being claimed under the same title as that which was the subject of the suit instituted in 1872, from which it had been omitted. It was also alleged that the property, with certain exceptions, belonged to the defendant.

The District Judge dismissed the suit as to so much of the claim as was brought for a specified share of property bequeathed by Bhávayyammá. He held that the whole foundation of the claim in respect of this property was the will, which took effect on her death in 1870; and that the claims, in the suit of 1872 for the mitta, and in the present suit, arose out of the same cause of action—infringement of title under the will. This claim, accord-

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PITTAPÚR RÁJÁ v. SURIYA RÁU.

ingly, if tenable, ought to have been included in the former suit; and having been omitted was barred by the operation of s. 7 of Act VIII of 1859.

On appeal to the High Court, a decree was made on 31st July 1878, reversing the above decision and remanding the suit for trial, upon issues raising questions as to whether, under this will, the plaintiffs had a right to share in the personal property of Bhávayyammá; and, if so, what that property was.

The successor in office of the District Judge, who gave judgment in the first instance, found the first of the above in the affirmative; and also returned findings as to the property of Bhávayyammá.

The defendant having filed, on the 22nd March 1879, her memorandum of objections, the High Court (Innes and Kernan, JJ.) gave final judgment on the whole case, altering the decree of the District Judge and holding that the plaintiffs were entitled to a half share in such of the property claimed as was specified in their decree. So much of their judgment as related to their reasons for holding s. 7 to be inapplicable was as follows:—

"Plaintiffs had for some time been in quiet possession of the mitta of Virávaram under the will, when a tortious act of the defendant in respect of the mitta drove them to a suit to set aside the effect of that tortious act, which operated as a constructive dispossession. No doubt, in consequence of the defence set up it became necessary for plaintiffs to give evidence of the will, the execution of which defendant denied. But the right and its infraction, not the ground of origin of the right and its infraction, constitute the cause of action, the cause, not the cause of the cause. In suit No. 12 of 1872, possession under the will and wrongful invasion of that possession, not the will itself and wrongful challenge of the validity of the will, constituted the cause of action.

"This view is supported by the opinions of the Judges of the High Court of Judicature in England in *Vaughan* v. *Weldon*,(1) which followed the carefully-considered decision in *Jackson* v. *Spittall*,(2) in which, after consideration of all the previous authorities, it was held that the act on the part of the defendant, which gives the plaintiff his cause of complaint is the cause of

(1) L.R., 10 C.P., 47.

(2) L.R., 5 C.P., 542.

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action within the meaning of the Common Law Procedure Acts. Several other cases were referred to by Mr. *Johnstone*, viz., *Mothoormohun Mundul* v. *Khemunkurre Dossee*,(1) *Kooer Golab Sing* v. *Rao Kurun Sing*,(2) *Náráyan Bábáji* v. *Pándurang Rámchandra*,(3) *Rao Kurun Sing* v. *Nawab Mahomed Fyz Ali Khan*,(4) the judgment in *DeSouza* v. *Coles*,(5) which are all in accordance with this view. The cause of action in the former suit, therefore, was the wrongful registration of the mitta, and from the nature of the case is obviously not the same as the cause of action in the present suit as to the share in the personal property of Bhávayyammá."

On this appeal, Mr. *J. F. Leith, Q.C.*, and Mr. *R. V. Doyne*, for the appellant, argued that the causes of action, as well as the title, in regard to both the real and personal estate bequeathed to the respondents had been correctly held by the first Court to be identical. The main question, as to both classes of property, was whether they passed by the will, and the possession of both had been withheld. Reference was made to *Súbba Ráu* v. *Ráma Ráu*,(6) and to *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*,(7) where the test for determining whether s. 7 was applicable was explained in the judgment.

The following was referred to in the judgment, at page 605, in the latter case:—"Their Lordships think that the correct test in all cases of this kind is whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit, and they have accordingly considered whether the present suit can be maintained on that ground."

Mr. *J. D. Mayne* and Mr. *G. P. Johnstone*, for the respondents, were not called upon.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—Upon the several questions of fact which were raised in this suit, there are two concurrent findings. As to one portion of the claim there is the finding of the Court which tried the case in the first instance; and as to the other portion there is the finding of the Court which tried the case upon

(1) 5 W.R., C.R., 182.
(2) 10 B.L.R., 1.
(3) 12 Bom. H.C.R., 148.
(4) 14 M.I.A., 187.
(5) 3 M.H.C. R., 384 (at p. 414.)
(6) 3 M.H.C.R., 376.
(7) 11 M.I.A., 551.

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PITTAPÚR RÁJÁ v. SURIYA RÁU.

remand. The High Court concurred with those respective findings. It is contended, however, that the High Court threw the onus of proof upon the defendant, whereas it ought not to have been so thrown. But the Court did not throw the onus upon the defendant as a matter of law, but merely in drawing their own conclusions from the evidence upon matters of fact.

Their Lordships see no reason to think that the High Court erred in point of law, or in point of fact, in arriving at conclusions similar to those which had been come to by the Courts below.

The only remaining question then is whether, by reason of the non-claim in respect of the personal property in 1872, when the action was brought in respect of the estate called Virávaram, the plaintiffs were by s. 7, Act VIII of 1859, precluded in 1875 from bringing this action in respect of the personal property.

Their Lordships are of opinion that the claim in respect of the personalty was not a claim falling within s. 7 of Act VIII of 1859. That section does not say that every suit shall include every cause of action, or every claim which the party has, but "every suit shall include the whole of the claim arising out of the cause of action"—meaning the cause of action for which the suit is brought. The claim in respect of the personalty was not a claim arising out of the cause of action, which existed in consequence of the defendants having improperly turned the plaintiffs out of possession of Virávaram. It was a distinct cause of action altogether, and did not arise at all out of the other. It is not like the case of one conversion of several things. There the act of conversion of the several things is one cause of action, and you cannot bring an action for the conversion of one of the things, and a separate action for the conversion of another. The conversion of the whole is one claim and one cause of action.

The case which Mr. *Doyne* cited from the 11th Moore's Indian Appeals, page 553, decides: "That the correct test is, whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit." Their Lordships are of opinion that the claim in respect of the personalty was founded on a cause of action distinct from that which was the foundation of the former suit.

For the above reasons, their Lordships are of opinion that the plaintiff was not barred by s. 7 from maintaining his present

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suit, and they will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal. The appellant must pay the costs of this appeal.

Solicitors for the appellant—*Cobbold & Woolley.*

Solicitors for the respondent—*Burton, Yeates, Hart, & Burton.*

PRIVY COUNCIL.

VIZIARÁMARÁZU (PLAINTIFF),

and

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).

P.C.* 1885. March 12 & 13.

11 mad. 309.

[On appeal from the High Court at Madras.]

Limitation Act XV of 1877, *s.* 10—*Allegation of holding in trust.*

By Act XV of 1877, s. 10, where property has become vested in a person in trust for a specific purpose, a suit to follow such property in his hands is not barred by lapse of time.

Acting under Regulation V of 1804, the Court of Wards took charge of an impartible zamíndárí, on the death of the zamíndár, leaving minor sons, of whom the eldest was afterwards recognized as heir and received possession on attaining full age. Upon a subsequent adjudication of forfeiture against him under Regulation VII of 1808, the Government obtained possession of the zamíndárí:

Held, that the Government was not placed in the position of a person in whom property had become vested for a specific purpose, and that the above section was not applicable to prevent the operation of the law of limitation under XV of 1877, which barred the suit brought by another of the sons, alleging title to the zamíndárí.

APPEAL from a decree (31st March 1882) of the High Court in its original jurisdiction.

The suit out of which this appeal arose was brought in December 1879 against the Secretary of State for India in Council, in reference to the receipt by the Government of Madras of the revenues, as they had accrued, of the impartible zamíndárí of Pálkonda, one of the hill zamíndárís of the Vizagapatam district. This zamíndárí came into the possession of the Government in 1835, as the result of forfeiture, upon the conviction, under Regulation VII of 1808, of the last zamíndár, the elder brother of the plaintiff.

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* *Present:* LORD BLACKBURN, SIR R. P. COLLIER, SIR R. COUCH, AND SIR A. HOBHOUSE.

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The zamíndárí being outside the local limits of the ordinary original jurisdiction, the plaintiff could not proceed therein for possession of the estate without an order which he failed to obtain. His suit was accordingly brought only for an account of the revenues received from the zamíndárí.

The plaint alleged that, on the death of Venkatapathirázu, the late zamíndár, in 1828, leaving three sons, of whom the plaintiff was the only legitimate one, the latter became entitled to succeed him; that the zamíndárí coming under the management of the Court of Wards, a trust was created, and the plaintiff's title should have been recognized; Kurmarázu, however, the eldest of the three sons, was wrongly recognized as successor; that, on the conviction of the latter under Regulation VII of 1808, the Government assumed possession of the zamíndárí and had retained it, the plaintiff remaining a State prisoner since 1834. He claimed an account of the rents and profits from the 29th September 1828, with interest.

The defence on behalf of the Secretary of State was that Kurmarázu had been properly recognized as heir, whether of legitimate birth or not, either as being heir by law (the family being Sudra), or by family custom, or as having been selected as heir under a family arrangement; secondly, that the forfeiture by order of the Governor in Council, duly made under Regulation VII of 1808, deprived every member of the family of his right to succeed; and lastly, that the suit was barred by limitation under Act XV of 1877.

At the hearing another defence, which, at one time, had been made with the above, viz., that the confiscation of the zamíndárí was an "act of State," was abandoned. No oral evidence was taken, but both sides relied on admitted documents. The statements on the report made by Mr. Russell, who was deputed to enquire into the disturbances in the Northern Circars, were accepted by the parties. The facts, at length, are set forth in the judgment of the High Court delivered by Turner, C.J. (Innes and Muttusámi Ayyar, JJ., concurring), printed in the report of the hearing of the case, before the settlement of issues, in the fifth volume of the Madras Series of the Indian Law Reports, p. 91.

Briefly, they were that Venkatapathirázu died in 1828, leaving Kurmarázu, Viziarámarázu, and Niladri Narendra, his three sons.

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In consequence of the reports of the Collector, made in 1828 and again in 1829, Kurmarázu was recognized as heir, the Court of Wards in the same year having taken charge of the estate. Kurmarázu having come of age in 1832, was put into possession. Disturbances then occurring in the villages, amounting to rebellion, martial law was proclaimed under the provisions of Regulation VII of 1808, Kurmarázu having been tried by court-martial, was found guilty of complicity in the rebellion, and sentenced to death, which sentence was commuted to one of imprisonment. The zamíndárí of Pálkonda was, under the same Regulation, declared to be forfeited to the Government, which took possession of it, making proclamation to that effect in 1835. Kurmarázu had died a prisoner of State in 1834. Niladri died many years before these proceedings.

The High Court observed, in its judgment (1), that possession had been taken by the Government as if the act of so doing had been one authorized by municipal law. If, in so doing, it had acted unlawfully, it was in no worse position than any private trespasser would have been, rendering it liable to eviction by the rightful owner pursuing his remedy within the time allowed by law; but capable of acquiring, under the law of limitation, a prescriptive title. The orders of Government, which detained the plaintiff at Vellore, did not deprive him of the power of instituting proceedings to assert his claims; and if the Government had not acquired a title by the forfeiture, it had long since acquired one by prescription. As to the existence of a fiduciary relation, it could not be maintained that the Government, by allowing the Court of Wards to take charge of the estate, had constituted itself a trustee for all the members of the family; nor could it be urged that, as a wrong-doer, the Government was, what was termed, a constructive trustee. The possession of the Court of Wards ceased, if it had not previously ceased when, in virtue of the forfeiture, the Government entered into possession of the zamíndárí as part of the public domain. And whether this possession was rightly taken or not needed not inquiry at this distance of time. The wrongful invasion, or possession, of a stranger, with or without knowledge of his want of title, would not make him a constructive

(1) I.L.R., 5 Mad., 95.

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trustee; provided that, as here, there was nothing to affect him with notice of a trust. The suit was dismissed, but as costs were not asked for, without costs.

On this appeal, Mr. *H. Davey, Q.C.*, and Mr. *J. H. A. Branson*, for the appellant, argued that the Court of Wards having entered upon the management of the zamíndárí of Pálkonda, stood, at one time, in the relation of trustee for the one of the three sons of Venkatapathirázu, who might be the rightful heir; and of this trust it was not divested during the minority of the plaintiff. On coming of age, he found the Government in possession by a title derived through his elder, but illegitimate, brother, Kurmarázu. If the Government was identified with the trustee, the Court of Wards, in the previous possession (and it was submitted that it was), then, notwithstanding the forfeiture incurred by Kurmarázu, the Government remained in a fiduciary relation towards the plaintiff; and could not use the possession, thus acquired, during the plaintiff's minority, against him. Thus there was no possession adverse to him, and the law declared in s. 10 of Act XV of 1877 was applicable. It was no answer to this to show that the Government had treated Kurmarázu as the lawful successor of the former zamíndár, inasmuch as the Government was trustee no less for the plaintiff than for him. The Court of Wards holding in trust on behalf of the rightful owner, let into possession one, who, whether entitled or not (and the plaintiff denied that he was entitled), did not represent all the interests involved. And a trustee was under no circumstances allowed to set up a title adverse to his *cestui que trust*, as decided in *Attorney-General* v. *Munro*.(1) Moreover, it was part of the appellant's case that neither the Court of Wards, nor the Board of Revenue, were other than departments of the State. Through them the Governor in Council acted, also acting through the Collector. The same chief authority, before the appellant attained majority, obtained possession of the estate by getting it back from Kurmarázu. The argument was thus made good that the Government had not acquired a title. The possession, in fact, which the Government took, on the forfeiture of Kurmarázu, was not a possession derived from an absolute *jus tertii*; and it was not permissible that a trustee, recognizing a title other than that of his *cestui que trust*, and then

(1) 2 De. G.& S., 163.

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taking a transfer of it, should set it up against that *cestui que trust*. For these reasons it was submitted that the judgment of the High Court was erroneous.

Reference was also made to part of the judgment in the *Secretary of State for India in Council* v. *Kamáchee Boye Sahaba* (*Tanjore case*).(1)

Mr. *E. Macnaghten*, Q.C. and Mr. *J. D. Mayne*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by

LORD BLACKBURN.—The present case, when understood, seems to be reduced to a very short point indeed. When the old zamíndár, the father of the present plaintiff, died, he left three infant sons and some infant daughters. There was a dispute as to which of those three infant sons, by different mothers, was the heir to the zamíndárí. It is not necessary for their Lordships to express any opinion as to which was the right heir. Upon the father's death, the resident Magistrate went hastily to the spot in order to preserve the peace. He immediately reported what was the state of things that he found there, and that is the report which we have first got. That was in October 1828, and, at that time, nothing further was done than the Magistrate going there to protect the peace and reporting. He afterwards went further than that. In May, having made inquiries and found that there were plausible grounds for claims on each side, and that the general feeling of the country was in favor of Kurmarázu, the eldest of these boys, who was not born in wedlock, but who had been adopted by the principal wife, and who, there were plausible grounds for saying, really was the heir (their Lordships say no more than that there were plausible grounds for so saying), he recommended that he should be recognized as the heir to the zamíndárí. The Court of Wards Regulation Act, Regulation V of 1804, s. 6, provides as follows:—"The proceedings of the Court of Wards shall, in the first instance, be founded on the reports of the Collectors respectively to the end that no delay may occur in providing for the due security and management of the property of persons incapacitated by minority, sex, or natural infirmity; but Collectors making such reports upon insufficient authority, whereby inheritors of property

(1) 7 M. I. A., 476.

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shall be deprived of the possession and management of the said property on their own behalf, shall be liable to prosecution." Before anything was done upon his report, he proceeded to appoint guardians of the persons of each of these infants, not merely of the persons of the plaintiff and other sons, but also of the persons of the female children of the deceased zamíndár. These, however, were mere personal guardians, and, in appointing them, nothing was done touching this estate at all. On the 17th July 1829, the Secretary to the Government writes to the Board of Revenue, acknowledging the reports. He says: "2. Upon the understanding that Kurmarázu, the person recognized by the Collector as the heir and successor to the zamíndárí is so acknowledged by all parties concerned in the succession, the Right Hon'ble the Governor in Council resolves to recognize him as zamíndár of Pálkonda; and as he is incapacitated by minority from administering his own affairs, authorizes you to take the estate under your charge as Court of Wards, and to exercise the powers conferred by Regulation V of 1804."

That is the first act of the Government upon the matter. What the Government has there done is this. They state that, upon the reports of the Collector, they will recognize Kurmarázu, and they authorize the Collector to take the estate under his charge, under the Regulation. Upon that the Court of Wards, undoubtedly, would become guardians of Kurmarázu, and, as such guardians, no doubt they took possession of the estate. It appears from a document, which is not printed, but which Mr. *Davey* read, that when Kurmarázu came of full age the property was given over to him, and he was proclaimed as zamíndár. On the assumption, upon which it must not by any means be understood that their Lordships have formed an opinion, because they have not the materials, that Kurmarázu was a usurper and the plaintiff was entitled, the Court of Wards seem to have acted *bonâ fide* and upon very sufficient grounds, and, at the most, if the individuals acting as the Court of Wards were guilty of misconduct, that would not in any way affect the Government. Kurmarázu was then put into possession. Their Lordships see nothing which would have prevented the plaintiff, when he came of full age, bringing an action against Kurmarázu, saying: "I am the true heir, and you are the usurper," and trying to recover the estate.

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Their Lordships know nothing what case he could have made, but there is nothing that would have hindered his doing so at that time. Whilst Kurmarázu was thus in possession of the property —for it seems clear that he was so—he was tried for high treason and rebellion, and convicted and sentenced to death.

That brings us to the next consideration, which perhaps hardly arises. It is under Regulation VII of 1808, s. 3: "It is hereby further declared that any person born or residing under the protection of the British Government within the territories aforesaid, and consequently owing allegiance to the said Government, who, in violation of the obligation of such allegiance, shall be guilty of any of the crimes specified in the preceding section" —which includes treason—and who shall be convicted thereof by the sentence of a court-martial during the establishment of martial law, shall be liable to immediate punishment of death, and shall suffer the same accordingly by being hanged by the neck until he is dead. All persons who shall in such cases be adjudged by a court-martial to be guilty of any of the crimes specified in this Regulation shall also forfeit to the British Government all property and effects, real and personal, which they shall have possessed within its territories at the time when the crime of which they may be convicted shall have been committed." Kurmarázu, therefore, at that time, being so convicted under the court-martial, forfeited all the right which he had to the zamíndári. If the plaintiff had come forward at that time and said that he was the right heir, and that Kurmarázu was but a usurper, their Lordships do not see that the forfeiture of Kurmarázu would have affected the rights of the plaintiff to recover that land. As to that their Lordships say nothing, except that probably it would not. But at that time the Government came into possession, claiming by way of forfeiture from Kurmarázu, who had certainly been in possession in the manner which has been described. From the time the plaintiff came of full age, which is stated to have been in 1837, far more than the period mentioned in the Statute of Limitations has run. Now, the contention, and the only contention, is this—the Statute of Limitations, Act XV of 1877, s. 10, the only section cited, says: "Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or

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against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time." It is contended that, under the circumstances already stated, the Government coming into possession under a claim of forfeiture from Kurmarázu, who had been let into possession by the Court of Wards (we will for the present purpose assume by mistake), are a person in whom the property had become vested in trust for a specific purpose, and that this action is brought against such a person for the purpose of following, in his or their hands, such property. It does seem to their Lordships not possible to make it clearer that that section does not apply to this case than by simply stating what that section is and what the case is. That is the only point on which the appeal has been brought, and it is the only point which it is necessary to decide.

Their Lordships, therefore, have not the slightest hesitation in advising Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Appeal dismissed with costs.

Solicitors for the appellant—*Keen, Rogers & Co.*

Solicitors for the respondent—*H. Treasure.*

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, and Mr. Justice Brandt.

1885. April 24.

REFERENCE FROM THE BOARD OF REVENUE UNDER S. 46 OF THE INDIAN STAMP ACT, 1879.*

Stamp Act, s. 3(10)—*Unduly stamped—Rule* 5 (*e*) *of the Government of India,* 3rd *March* 1882 (*attestations of plain sheets subjoined to stamped documents*), ultrâ vires.

Of the rules, dated 3rd March 1882, issued by the Governor-General in Council, under ss. 9, 15, 17, 32, 51 and 56 of the Indian Stamp Act, 1879, rule 5 (*e*) requires that the part of an instrument which is written on plain sheets of paper attached to the stamped paper must be attested by the parties executing, and by the witnesses to, the document:

Held by Kernan, Muttusámi Ayyar, and Brandt, JJ., (Turner, C.J., dissenting) that the rule is *ultrâ vires* and inoperative for the purpose of declaring an

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* Referred Case 6 of 1884.

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instrument, written contrary to the provisions thereof, unduly stamped within the meaning of s. 3 (10) of the Act.

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Per Turner, C.J.—An instrument not written in accordance with the directions in rule 5 (*e*) is not duly stamped.

THIS was a reference by the Board of Revenue to the High Court under s. 46 of the Indian Stamp Act 1879.

The case was stated, on the 17th July 1884, by the Board of Revenue in the following

RESOLUTION :—"The Registrar has impounded and forwarded to the Collector certain documents, because they contravene rule 5 (*e*) of the rules, dated 3rd March 1882, issued by the Government of India under ss. 9, 15, 17, 32, 51, and 56 of the Stamp Act.

"These documents are written on impressed sheets of sufficient value, but to these sheets plain papers are attached, and those portions of the documents are not attested by the witnesses, who attested the stamped sheets.

"As these rules have the force of law, the documents are not duly stamped, and the Collector must proceed under s. 37 (*b*) to levy the duty as if they were unstamped and a penalty in addition.

"But the Board resolve to refer to the High Court the question whether the rule thus contravened is not *ultrâ vires.* They can find no provision in the Stamp Act, which empowers the Government of India to issue this rule. If s. 56 is quoted to justify it, then, as remarked by Sir Michael Westropp at 5 Bombay Series, 197, it is for the High Court to consider whether the rule is consistent with the Act, the Act being fiscal in its character, and the rule adding provisions more stringent than the Act warrants."

The (*Acting*) *Government Pleader* (Mr. *Powell*) for the Board of Revenue referred to s. 9 of Act I of 1879 and contended that rule 5 (*e*) was *ultrâ vires.*

The following judgments were delivered by the Full Bench (Turner, C.J., Kernan, Muttusámi Ayyar, and Brandt, JJ.) :—

TURNER, C.J.—It cannot be held that the document, in respect of which this reference is made, is an unstamped document. It is written on a stamped paper and therefore the term unstamped in its ordinary meaning cannot apply to it. It is written in such a manner that the stamp appears on the face of it, and cannot be used for, or applied to, any other instrument and it has not been written on a paper on which an instrument chargeable with duty

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has been already written. It is not then to be deemed unstamped under s. 14? Is it an instrument not duly stamped? According to the definition given in the Act, duly stamped means stamped or written upon paper bearing an impressed stamp in accordance with the law in force in British India, when the instrument was made. The law required that it should be written on a stamp of a certain value and description, and it has been written on paper bearing a stamp of the value and description prescribed. It bears no more stamps than the number prescribed. The objection taken to it is that the plain sheets of paper, which have been used to supplement the sheet bearing the stamp, have not been attested in the manner required by rules 5*a* and 5*e*.

Rule 5(*a*) prescribes that, except in the cases specified, where any instrument is to be written on a single stamp, a single sheet shall be used, and rule 5 (*e*) that where a single sheet is found insufficient to admit of the entire instrument being written on the side of the paper, which bears the stamp, so much plain paper may be subjoined thereto as may be necessary for the complete writing of the instrument.* * * Provided * that the part of the instrument made on plain paper must be attested by the signature or marks of all the persons executing the document and of the witnesses to the same.

Are these rules consistent with the Act and do they carry out the purpose of the Act? The object of so much of the rules, as we have quoted, is to secure the observation of the provisions of s. 27, which require that the consideration and all other facts and circumstances affecting the chargeability of the instrument with duty or the amount of the duty with which it is chargeable shall be fully and truly set forth therein. The rules then, it must be admitted, do carry out a purpose of the Act, but are they consistent with the Act? It cannot be said they are not. They contravene no provision of the Act.

The instrument then being an instrument not duly stamped, is it ineffectual?

It is clear that with the exception of certain instruments which are specified, the Legislature intended that no document should thereafter be ineffectual for want of a stamp, whether it were an unstamped document or a document not duly stamped, but that on payment of the value of the proper stamp, or of the deficiency

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between the proper stamps borne by it and the full stamp with a penalty, the defect should no longer operate to invalidate the instrument. The instrument, we are considering, bears a stamp of the proper character and to the full value, but not being written in accordance with the rule it is not duly stamped and can be admitted in evidence only under the proviso to s. 34. That that proviso did not contemplate the case, I fully admit. Possibly it is liable only to the penalty, and the argument that the payment of the penalty will not remedy the inherent defect is answered by the observation that neither will the payment of the duty and penalty remedy the defects in instruments which under s. 14 are to be deemed unstamped, but nevertheless such payment effects all that the parties to them require—it relieves them from the operation of the first paragraph of s. 34.

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In answer to the question addressed to us, I have only to say that I am of opinion that the rule is not *ultrà vires*.

KERNAN, J.—The Stamp Act, 1879, in s. 56, authorizes the Governor-General in Council to make rules consistent with the Act to carry out generally the purposes of the Act. Section 57 provides that all such rules published as thereby directed shall on publication have the force of law.

On the 3rd of March 1882, rules were made by the Governor-General in Council, referring to s. 56 of the Act. Amongst others, rule 4 requires impressed stamps to be used. Rule 5(*e*) is "When a single sheet used under this rule is found insufficient to admit of the entire instrument being written on the side of the paper which bears the stamp, so much plain paper may be subjoined thereto as may be necessary for the complete writing of the instrument. Provided further that the part of the instrument written on plain paper must be attested by the signature or marks of the person executing the document and the witnesses to the same."

In the case before us, a single sheet was insufficient and four sheets of plain paper were subjoined to the impressed sheets. The instrument was executed by the parties on the several sheets, and the signatures of the witnesses were made on the stamped sheet. Either through error, accident or inadvertence the four plain sheets were not attested by the signature or marks on it of the witnesses to the same. The instrument is stamped with the proper amount of duty required by the schedules to the Act.

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The question is whether, by reason of the four plain sheets not bearing the attestation of the witnesses, the instrument is to be held to be not duly stamped within the meaning of sub-section 10 of s. 3 of the Act—the Stamp Act. My view is that the instrument in question is duly stamped under the Act, notwithstanding the rule.

Sub-section 10 is: "Duly stamped," as applied to an instrument, means stamped, or written upon paper bearing an impressed stamp, in accordance with the law in force in British India, when such instrument was executed, or first executed.

Section 12 provides that every instrument written on paper, stamped with an impressed stamp, shall be written in such manner that the stamp shall appear on the face of the instrument and cannot be used for, or applied to, any other instrument.

Section 13 provides: "No second instrument chargeable with duty shall be written upon a piece of unstamped paper, upon which an instrument chargeable with duty has already been written" subject to an exception thereby provided not material to this case.

Section 14 provides: "Every instrument written in contravention of s. 12 or s. 13 shall be deemed not duly stamped." The chargeability of any instrument with duty, or the amount of the duty with which it is chargeable, shall be fully and truly set forth.

Section 28 provides for many circumstances relating to the consideration which must be set forth and which affects the amount of duty chargeable. Chapter III relates to "Adjudications as to stamps." Section 30 provides that if any instrument, whether executed or not, and whether stamped or not, is brought to the Collector to have his opinion as to the duty, if any, chargeable, the Collector shall determine the duty, if any, with which, in his opinion, the instrument is chargeable, and he may require an abstract of the document and evidence as to the facts and circumstances affecting chargeability. Section 31 provides that, when the Collector determines such an instrument is chargeable with duty and (*a*) that it is fully stamped, or (*b*) that the duty he determined under s. 30, or a certain sum has been paid, he shall certify by endorsement that the duty has been paid, and the instrument may then be read in evidence and acted on as if it had been originally duly stamped.

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Chapter IV relates to "Instruments not duly stamped."

Section 33 enables certain officers to impound instruments, which appear to be not duly stamped.

Section 34 provides: "No instrument chargeable with duty shall be admitted in evidence for any purpose or acted on," unless such instrument shall be duly stamped.

Provided that—

1. Any such instrument (not being an instrument chargeable with one anna only or a bill of exchange or pro-note) shall, subject to just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or (in case of an instrument insufficiently stamped) of the amount required to make up such duty, together with a penalty of five rupees, or when ten times the amount of the proper duty or deficient portion thereof exceeds Rs. 5, of a sum equal to ten times such duty or portion.

Section 35 provides that, when the officer impounding an instrument admits it in evidence, on payment of the penalty, as provided by s. 34, he shall send a copy of it to the Collector with a certificate, stating the amount of the duty and penalty levied and shall send such amount to the Collector, or such person as he shall appoint, and (second clause) in all other cases the officer is to send the original instrument to the Collector.

Section 36 relates to refund of penalty in proper cases.

Section 37 provides that when the Collector impounds an instrument under s. 33, or receives an instrument under the second clause of s. 35, he shall adopt the procedure thereby directed.

Section 38 provides that, if any instrument chargeable with duty, and which is not duly stamped, is produced by any person of his own motion before the Collector within one year from the date of its execution or first execution, and if such person brings to the notice of the Collector the fact that it is not duly stamped and offers to pay the Collector the amount of the proper duty or the amount required to make up the same, and the Collector is satisfied that the omission to duly stamp such instrument has been occasioned by accident, mistake or urgent necessity, he may, instead of proceeding under ss. 33 and 37, receive such amount and proceed as next prescribed.

Section 39 provides when duty and penalty, if any, leviable in respect of any instrument, have been paid under ss. 34,

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37 or 38, the person admitting such instrument in evidence, or the Collector as the case may be, shall certify by endorsement thereon that the proper duty or (as the case may be) the proper duty and penalty (stating the amount in each case) have been levied in respect thereof. Every instrument so endorsed shall thereupon be admissible in evidence and acted on and authenticated as if it had been duly stamped and shall be delivered to the person, from whose possession it came or as he may direct.

Section 56 enables the Governor-General in Council to make rules consistent with the Act to carry out generally the purposes of the Act.

Section 57 provides that all rules published as required shall, upon such publication, have the force of law.

The purpose and object of the Act is to raise revenue by means of money to be paid by the public for stamps issued by Government, under the authority of the Act.

Under the Act, every instrument, thereby made chargeable with duty, must be duly stamped, that is, stamped or written on paper bearing an impressed stamp in accordance with the law in force in British India where the instrument was executed or first executed.

From the synopsis above set out, it is clear that the intention expressed by the Act is that, if by error, accident or inadvertence, an instrument, except one anna instruments, when executed or first executed did not bear a stamp of the proper amount or description, required by the Act, and if within the period of time limited by the Act after execution or first execution, when time is referred to, the person claiming to put the deed in execution or to have it acted on, paid the proper amount of duty, or sufficient to make up the proper amount, then such person should be entitled to do so, on payment of penalty, which penalty might in certain cases be remitted.

The object of the Act, as every section of it shows, was to secure payment of the proper *amount* of duty, and to prevent instruments not so bearing the proper amount of duty from being of any avail until the proper amount of duty was paid. For this purpose, s. 34 prevents such an instrument being received in evidence or acted on. But by the proviso of that section the instrument may be received in evidence if the duty or the proper

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portion of duty in case of an insufficiently stamped instrument is paid together with a penalty thereby prescribed. In like manner when an instrument not duly stamped is brought to the Collector for his opinion under s. 30 or s. 38 and on payment of the duty specially leviable under ss. 34, 37, 38 as the case may be, endorsement is to be made by the person admitting the instruments in evidence or by the Collector, as the case may be, that proper duty and penalty have been levied, and every instrument so endorsed shall be admissible in evidence and acted on.

Then the Act provides that on payment of proper amount of duty and penalty, if penalty is required, any instrument not duly stamped with the proper *amount* of duty when executed or first executed, may be received in evidence and acted on, with the exception of instruments subject only to one anna duty, and bills of exchange, notes and cheques.

There is no doubt that the proper amount of duty has in this case been paid. There are only two cases mentioned in the Act in which though the proper amount of duty has been paid, yet that the instruments are to be held not duly stamped and those cases are mentioned in ss. 12 and 13. But even for those cases a remedy is provided. Section 12 directs that every instrument written on impressed paper shall be written in such manner that the stamp may appear on the face of the instrument and not be used for, or applied to, any other instrument, and s. 13 provides that no second instrument shall be written on stamped paper, on which an instrument, chargeable with duty, has been already written. It is possible that the instruments in these cases might have borne, when executed or first executed, the proper amount of duty, yet the Act provides, s. 14, that every such instrument written in contravention of s. 12 or s. 13 shall be deemed to be unstamped. In these cases it was not unreasonable to treat the instruments written in contravention of the sections as unstamped, though the proper amount of duty might have been already paid, but even in such cases under ss. 12 and 13 the party had a remedy by paying duty and penalty, if any, and, under ss. 36 and 37, the Collector might remit the whole penalty.

The Act provides a penalty for every infraction of its provisions, and also provides a means whereby all instruments (except as already mentioned) not duly stamped, and therefore inadmissi-

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REFERENCE UNDER STAMP ACT, S. 46.

ble in evidence, may be duly stamped and made admissible in evidence.

In this case, can it be held that by reason of the last clause in rule 5 of 1882, the instrument is unstamped? The rule does not provide that instruments in contravention of the rule shall be deemed unstamped, as s. 14 of the Act does in respect of ss. 12 and 18. If it did so provide, probably it would not be inconsistent with the Act as the parties could pay the duty and the penalty. But as it now stands, there is no provision to enable the parties to have the instrument properly stamped and the instrument made admissible in evidence. Take the rule as part of the Act and s. 34 would not apply to the rule. It may be very reasonably doubted whether the rule is consistent with the Act to carry out its provisions.

Such rule appears to me to go beyond the provisions by enacting penalties in respect of a matter not relating to the securing of proper amount of stamp duty. The effect of the rule, if held to be authorized by the Act, would not in such a case as this prevent the party claiming under the instrument from giving it in evidence at any time, inasmuch as the rule or the Act provides no means of making the instrument properly stamped, even though the omission as to the witnesses was the result of mere error, accident, or ignorance.

The result would be probable loss of considerable property to one party and gain by another party.

I think the rule is more stringent than the Act warrants, and is therefore *ultrâ vires*.

MUTTUSÁMI AYYAR, J.—The instrument which forms the subject of this reference is written upon a paper bearing an impressed stamp of the value prescribed by Act I of 1879. It is, therefore, stamped with a stamp of the value and description required by the law in force in British India when it was executed.

In addition to the paper bearing the impressed stamp, several sheets of plain paper are used for completing the document, but instead of each of such sheets being signed and attested as required by the rule made by the Government of India on the 3rd March 1882, the first sheet is alone signed and attested, while the other papers are not attested though signed by the executants. The question referred, for our opinion, is whether the instrument is on

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this ground to be treated as not duly stamped within the meaning of cl. 10, s. 3, of the Stamp Act.

This section declares that the words duly stamped mean "stamped or written upon paper bearing an impressed stamp, in accordance with the law in force in British India when such instrument was executed or first executed." The rule referred to is to the following effect:—"When a single sheet (impressed) used is insufficient to admit of the entire instrument being written on the side of the paper which bears the stamp, so much plain paper may be subjoined thereto as may be necessary for the complete writing of such instrument, provided that in every such case the side of the sheet which bears the stamp must be covered by a substantial part of the instrument before any part of the latter can be written on the plain paper joined to such sheet. Provided, further, that the part of the instrument written on the plain paper must be attested by the signatures or marks of all the persons executing the document and the witnesses to the same. Does cl. 10 refer only to the instrument in so far as it is written upon paper bearing the impressed stamp, or does it also include the authentication of each sheet of plain paper, which is added to the paper bearing the impressed stamp?

I may refer to s. 33 and s. 34 which throw light on s. 3, cl. 10.

The former confers a power on every person in charge of a public office to impound all instruments which appear to him to be "not duly stamped," and directs him for the purpose of exercising that power, to examine the instrument in order to ascertain whether "it is stamped with a stamp of the value and description required by the law in force when it was executed." It will be seen that no reference is made to the mode in which each sheet of plain paper is authenticated as one of the matters to be considered for the purpose of impounding the document. Again s. 34 prescribes the conditions subject to which certain classes of instruments *not* duly stamped may be received in evidence or acted upon by a public officer. The conditions are (1) the payment of the duty with which the instrument is chargeable or (in the case of an insufficiently stamped instrument) of the amount required to make up such duty, together with a penalty of Rs. 5, or when ten times the amount of the proper duty or deficient portion thereof exceeds Rs. 5, of a sum equal to ten times such duty

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REFERENCE UNDER STAMP ACT, S. 46.

or portion. It must be observed here that no power is given to admit an instrument not duly stamped in evidence except on the payment of the duty with which the instrument is chargeable when it is not stamped at all, or of deficient stamp duty when it is insufficiently stamped. It is conceded that the instrument before us cannot be treated as unstamped, or insufficiently stamped, and the section does not contemplate a case in which a penalty alone is payable without some stamp duty. The inference is to be drawn that the expression "not duly stamped" does not refer to the mode in which the plain papers are authenticated. Further, the Stamp Act is framed with the primary intention of protecting the stamp revenue, and when the proper duty is therefore paid and when the payment is denoted by the proper stamp and when the paper bearing the impressed stamp is written upon in the prescribed mode, the omission to authenticate each subjoined plain paper cannot affect the duty and must be considered to lie outside the purview of the Act as to the value and description of the stamp.

It was suggested that the rule was framed under s. 56 to prevent the subsequent interpolation of plain sheets of paper in order to understate the value of the property to which the instrument may relate. Taking it then that such was the intention, how does such interpolation differ in principle from a fraudulent mis-statement of the value in the substantial part of the instrument written on the paper bearing the impressed stamp or from the case in which the signature and the attestations on the additional sheets of plain paper are forged? Such collateral frauds are punishable either under the general law or under s. 63. But it seems to me that they do not render the document *unduly stamped* any more than the forgery of a document on proper stamp renders it unduly stamped. The rule was intended, I think, in so far as it relates to the authentication of each sheet of plain paper, to create a facility in regard to the working of s. 63. If it is taken that the intention was to add to the requirements of s. 3, cl. 10, the authentication of each additional sheet of plain paper, I must then say that the rule goes beyond the intention of the law and that the instrument cannot be treated as not duly stamped. My answer to the question is that the rule is not intended to add the authentication of each sheet of plain paper

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to the requirements of s. 3, cl. 10, and if it is, it goes beyond the intention of the law and is inoperative for the purpose of declaring the instrument unduly stamped. REFERENCE UNDER STAMP ACT, S. 46.

BRANDT, J.—The instrument before us is duly stamped within the meaning of s. 3 (10) of the Stamp Act, in so far as it is "written upon paper bearing an impressed stamp, in accordance with the law in force in British India at the time when it was executed." Is it not duly stamped by reason of its being written in a manner which fails to meet all the requirements of rule 5 (*e*) contained in the Notification of the Governor-General in Council published in the Gazette of India, and dated the 3rd March 1882? The question stated in another form is whether that rule "is consistent with the Act for carrying out generally the purposes of the Act?"

If the instrument can be deemed to be unstamped within the meaning of s. 14 of the Act it can be validated and admitted on payment of the full stamp duty and penalty. If it cannot be taken to be unstamped within the meaning of that section, there does not appear to me to be any means whereby the instrument can be made good at all. And, if it cannot be, this would seem to constitute strong ground for doubting whether a rule having such an effect can be held to be consistent with the general purposes of the Act.

The Act provides for the making good, for the admission, on payment of full or deficient stamp duty (as the case may be) and penalty (which in some cases may be remitted) of all instruments not duly stamped, such instruments not being chargeable with a duty of one anna only, or bills of exchange, or promissory notes.

Instruments not duly stamped or those which are not so

(*a*) by reason of their being unstamped in fact;

(*b*) those which, though stamped, whether sufficiently or insufficiently, are to be deemed to be unstamped for the purposes of the Act;

(*c*) by reason of their being insufficiently stamped;

(*d*) by reason of their not being stamped with a stamp or stamps, or written on paper not impressed with a stamp or stamps of the character, description or number prescribed by the Act and rules made in accordance therewith.

Instruments not written in the manner prescribed by s. 12

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REFERENCE UNDER STAMP ACT, S. 46.

or 13 are to be, under s. 14, deemed to be unstamped. But no provision is made in the Act for validating an instrument like that before us which is sufficiently stamped, and stamped in accordance with the law in force, in so far as the description and character of the stamped papers used is concerned and is not written in a manner prohibited by the Act.

The rule was, I think, we may assume, framed with a view to prevent the substitution of other papers not stamped, or bearing impressed stamps, on which a consideration not fully set forth in the instrument as appearing when presented (*e.g.*, before a Collector for adjudication under section 30, or before a Registration officer) in the place of one or more of the plain papers allowed under the rule to be used.

But s. 63 provides a very heavy penalty for neglect to comply with the requirements of s. 27; and though it would be the duty of any of the persons described in s. 33 to impound any instrument appearing to be not duly stamped by reason of the full consideration not being fully set forth as required by s. 27, it could hardly be contended that a Registration officer would be justified in refusing to register a document on the ground that one or more papers might in future be substituted in the place of the additional plain papers used.

After the best consideration which I can give to the subject, I can come to no other conclusion than that the rule 5 (*e*) in so far as it requires each additional piece of plain paper used to be signed or marked by all the executants and attesting witnesses is not consistent with the Act for carrying out the purposes of the Act.

The object of the enactment is the realization of stamp revenue by the State.

There are in it two sections only containing instructions and directions as to the manner in which instruments are to be written on stamped papers, or on papers bearing impressed stamps.

Instruments written in contravention of those requirements are to be deemed to be unstamped and as such can be stamped on certain terms.

The rule under our consideration imports a stringent provision as to the manner of writing instruments, while there is no provision in the Act under which instruments written in contravention of that rule can be treated as or deemed to be unstamped.

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The Act contains special provision for the punishment of the offence against which the rule in question is, it has been suggested, directed.

REFERENCE UNDER STAMP ACT, S. 46.

If the rule, which appears to relate rather to what would be required in proof of due execution of the document than to the duly stamping of the document, is to have any effect beyond being merely directory, it must, as it appears to me, be held to be a rule, which, having regard to what is and what is not enacted in the Stamp Act itself, is not consistent with the provisions of that Act for the purpose of carrying out the same. I am of opinion that the instrument is duly stamped in accordance with the law in force in British India at the time when it was executed.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1885. April 28.

VENKATALAKSMAMMA AND OTHERS (DEFENDANTS), APPELLANTS,

and

NARASAYYA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

26 Mad. 6..
11 C.W.N. 348
30 Mad. 52
34 I.A. 24.

Hindú law—Adoption—Authority—Consent of sapinda.

V, one of the nearest male sapindas of S, gave his son in adoption to the widow of S in 1878. Both the giver and receiver professed to have been carrying out the directions of S. In 1883 a suit was brought by N, another sapinda, to set aside this adoption, and it was found that S had not authorised the adoption as alleged by the defendants:

Held, that, under the circumstances, V's assent to the adoption did not render it valid.

THIS was an appeal from the decree of L. A. Campbell, District Judge of Nellore, reversing the decree of G. Rámachandra Ráu, District Múnsif of Nellore, in suit No. 877 of 1883.

The father of plaintiffs, Dhurgati Narasayya and his four brothers, the father of Venkayya, defendant No. 2, and the father of Sundararámáyyar, deceased husband of defendant No. 1 (Venkatalaksmamma), were divided brothers.

On the 5th March 1878, Sundararámáyyar died without issue.

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* Second Appeal 767 of 1884.

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VENKATA-LAKSHMAMMA v. NARASAYYA.

A year after his death, his widow adopted Subbayyar, defendant No. 3, a son of defendant No. 2.

This suit was brought in 1883 to set aside the adoption and for a declaration of plaintiffs' rights as reversioners to a moiety of certain property alienated by defendant No. 1 to defendants Nos. 4 and 5.

The Múnsif found that Sundararámáyyar, on his death bed, authorized the adoption and dismissed the suit.

On appeal, the District Judge disbelieved the evidence as to the authority given by Sundararámáyyar on his death bed, and held that a gift made to defendant No. 4 by defendant No. 1 was not binding on the plaintiffs.

Defendants Nos. 1—3 appealed.

Mr. *Wedderburn* for the appellants.

For the appellants it was argued that, as the adoption was admitted, plaintiffs were bound to prove its invalidity (*per* Sir R. Collier in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*).(1)

The authority alleged was negatived by the District Court, but the adoption was not therefore *necessarily* invalid. For five years, defendants had assented to the adoption and plaintiff No. 1 had been present at the annual ceremony of Sundararámáyyar, which was performed by Venkayya.

The evidence of Venkayya, which was not discredited by the Judge, showed that Sundararámáyyar shortly before his death had asked Venkayya to give his son in adoption and that Venkayya had refused, because he thought there was no probability of Sudararámáyyar dying prematurely. Venkayya thus, when asked after Sundararámáyyar's death by the widow to give his son, knew that her request was in accord with the wishes of the deceased. There could be no object in exercising any discretion or judgment in the matter, as required in ordinary cases (see I.L.R., 1 Mad., 82). Venkayya by giving his son, lost his right as a reversioner and here was no suggestion that he acted with any sinister motive. The consent of the sapinda, under such circumstances, was enough. The conduct of the plaintiffs also shows that they assented—*Parasara Bhattar* v. *Ranga Bhattar*.(2)

Mr. *Subramanyam* for respondents relied on the decisions of

(1) I.L.R., 1 Mad., 73. (2) I.L.R., 2 Mad., 202.

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11 C.W.N. 348.

Privy Council in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*,(1) *Ganesa Ratnamaiyar* v. *Gopála Ratnamaiyar*.(2)

The Court (Turner, C. J., and Hutchins, J.) delivered the following

JUDGMENT:—This is an appeal against so much of the decree of the District Court of Nellore as declares invalid the adoption by the appellant No. 1 of the appellant No. 3, the son of appellant No. 2.

In the plaint, the respondents asserted that the adoption had been collusively set up by the appellants Nos. 1 and 2 and was invalid. The ground upon which the appellants, in their written statement, rested their case was that the adoption had been made with the consent, or in pursuance of the direction of the deceased husband of appellant No. 1, Sundararámáyyar. The Lower Appellate Court has found, on the evidence, that Sundararámáyyar gave no such consent or direction.

It is now contended in second appeal that, at all events, the appellant No. 2 consented to the adoption and that his consent is sufficient since he is the eldest male sapinda and one of the nearest.

In *Parasara Bhattar* v. *Ranga Bhattar*,(3) it has been held by this Court that, where all the branches of the family are divided from the deceased husband and from one another, and equally distant from the deceased, the *boná fide* consent of one such divided member is sufficient, provided the assent of the others has been withheld from improper motives. Here the respondents, like appellant No. 2, are first cousins of Sundararámáyyar. It is not alleged that they have withheld their assent from improper motives; what is asserted is that they have tacitly acquiesced in the adoption, and the circumstance that the respondent No. 1 took food at the deceased's annual ceremonies, which were performed by the respondent No. 2, is relied on. But the respondent No. 2, as the eldest male sapinda, would have been the proper person to perform these ceremonies, even if there had been no adoption. It does not appear that he performed them in the name of his natural son, the alleged adopted son.

There is, however, another ground upon which this second

(1) I.L.R., 1 Mad., 73. (2) I.L.R., 2 Mad., 270. (3) I.L.R., 2 Mad., 202.

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VENKATA-LAKSHMAMMA v. NARASAYYA.

30 Mad 52

appeal may be determined, and which renders it unnecessary for us to consider the respondents' motives or conduct. Not only did the appellants rest their case on the assent of the deceased Sundararámáyyar and abstain from setting up any authorization by the appellant No. 3, but no evidence has been mentioned to us which would go to show any such authorization. As stated by the Judicial Committee in *Sri Raghunada* v. *Sri Brozo Kishoro* (1) "to authorize an act implies the exercise of some discretion, whether the act ought or ought not to be done; in the present case there is no trace of such an exercise of discretion." Appellant No. 3, as well as No. 1, professes to have been simply carrying out the direction of Sundararámáyyar, and it has been found that Sundararámáyyar did not give the directions alleged. The so called authorization by the appellant No. 3, to be implied from his having given his son, seems only to have been put forward as an after-thought to supplement the very weak evidence of an authorization by the husband. Though referred to at the conclusion of the case before the Múnsif, it does not seem to have been put forward in the District Court.

See also *Ganesa Ratnamaiyar* v. *Gopála Ratnamaiyar*,(2) another case before the Privy Council and referred to by the Múnsif in his judgment.

The second appeal fails and must be dismissed with costs.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

1884. October 1. November 25.

4 Bom. 627.
13 Mad. 520.
[illegible] 11 C.L.J. 478.

SITHALAKSHMI (DEFENDANT'S REPRESENTATIVE), APPELLANT,

and

VYTHILINGA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 331—Civil Courts Act, Madras, 1873, s. 12—Jurisdiction—Claim below ordinary pecuniary limit.

A Court executing a decree obtains, by virtue of s. 331 of the Code of Civil Procedure, a special jurisdiction which enables it to try a claim of which the value of the subject-matter falls below the pecuniary limit of its ordinary jurisdiction.

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* Appeal against Order 10 of 1884.

(1) L.R. 3 I.A., 154. (2) I.L.R., 2 Mad., 270.

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By virtue of s. 647 of the Code of Civil Procedure, a superior Court may, for sufficient cause, transfer a claim, registered under s. 331, to a Subordinate Court for trial.

SETHALAKSHMI v. VYTHILINGA.

This was an appeal from an order of C. W. W. Martin, Acting District Judge of South Tanjore, dated the 26th of October 1883, reversing an order of the Subordinate Judge of Tanjore.

In execution of a decree, passed in suit 98 of 1882 on the file of the Subordinate Court of Tanjore, directing the delivery to the decree-holder (by some of the judgment-debtors) of certain immovable property, a claim was made to a portion of such property. The officer charged with the execution of the warrant for the delivery of the property comprised in the decree was resisted and obstructed by the claimant. The claim was numbered and registered, under the provisions of s. 331 of the Code of Civil Procedure, as a suit between the decree-holder as plaintiff and the claimant as defendant. The value of the property, which was the subject of the claim, was below Rs. 2,500. The Subordinate Judge held that he had no jurisdiction to try the claim, as being within the jurisdiction of the Court of a District Múnsif. An appeal was preferred by the decree-holder to the District Court of Tanjore against the order of the Subordinate Judge. The District Judge held that the Subordinate Judge had jurisdiction to try the claim, and that the decision of the High Court in *Muttammál* v. *Chinnana Gounden*(1) was not applicable to the case; but he directed the transfer of the suit to the Court of the District Múnsif of Trivadi.

From this order an appeal was preferred to the High Court by the claimant, and the Division Bench (Turner, C.J., and Hutchins, J.), before whom the appeal came on for hearing, made the following order:—

"As we feel some doubt whether *Muttammál* v. *Chinnana Gounden*(1) was rightly decided, we consider that the question as to the competency of the Subordinate Judge to dispose of the claim as a suit should be referred to the Full Bench."

Bháshyam Ayyangár for claimant (appellant).

Mr. *Shaw* for decree-holder (respondent).

The following judgments were delivered:—

TURNER, C.J. (KERNAN, HUTCHINS, and BRANDT, JJ., concurring).—We are of opinion that the Court executing the decree

(1) I.L.R., 4 Mad., 220.

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SITHA-LAKSHMI v. VYTHILINGA.

obtains, in virtue of the provisions of s. 331, jurisdiction to try a claim, although in value its subject-matter falls below the pecuniary limits of its ordinary jurisdiction. The object of the Legislature, in enacting these and other similar provisions, was, so far as possible, to prevent the originating of a succession of suits. It desired that a right should be determined finally in continuation of an original proceeding and not by the institution of fresh proceedings. Having this object in view, it thought fit, where a Court has issued a warrant for possession, to impose on that Court the duty of investigating any *bonâ fide* claim on the part of a person resisting execution of the warrant. Its language is imperative. Where a duty is imposed on a Court there is impliedly conferred jurisdiction. The words "with the like power," on which reliance was placed in the argument of *Muttammál* v. *Chinnana Gounden*,(1) receive their full meaning if they be taken to express that the Court has the same powers for enforcing the attendance of parties and witnesses, &c., as it has in a suit. We, therefore, hold that the Subordinate Judge had jurisdiction to entertain the claim and this is in accordance with the decision in *Rávloji Tamáji* v. *Dholápá Rághu*.(2)

We also hold that, under the provisions of s. 647 of the Code of Civil Procedure, the Judge had power to transfer the claim to the Múnsif for decision. This is a power which should not be exercised without sufficient cause, and inasmuch as the parties desire it and we find no sufficient reason for directing the transfer of the claim to the Múnsif's file, the order of the Judge transferring it is set aside, and the Subordinate Judge is directed to proceed to determine it.

The appellant must bear the costs of the appeal and the respondent of the objection.

MUTTUSÁMI AYYAR, J.—The question for decision in this case is as to the effect of s. 331 of the Code of Civil Procedure. I am also of opinion that the Subordinate Judge is competent to try as a regular suit a claim under that section, though its value is below the inferior limit of his pecuniary jurisdiction. It creates a special jurisdiction as an exception to the general rule of prohibition prescribed by s. 15 of the Procedure Code. The reason for

(1) I.L.R., 4 Mad., 220. (2) I.L.R., 4 Bom., 123.

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such jurisdiction is probably the special facility arising from the fact that the object-matter of the claim is a part of the object-matter of a suit already decreed by the superior Court. It was argued further that a District Múnsif may also, under this section, try as a regular suit a claim, of which the value is in excess of the superior limit of his pecuniary jurisdiction. It was alleged that, if there is a special jurisdiction conferred upon a Subordinate Judge or a superior Court, it must also exist in the converse case, that is to say, in favor of an inferior Court. Section 15 embodied in it a rule of prohibition in the case of Courts superior to that of the District Múnsif, and, as the special jurisdiction was created as an exception and in relation to it, it seemed to me that the special jurisdiction could not in principle be extended to the inferior tribunal. It may be that the one case may be the converse of the other, but it is not difficult to conceive a reason for the rule of special jurisdiction not being intended to apply to both classes of cases. A superior Court is forbidden from trying a suit cognizable by an inferior Court, not on account of its inherent incompetency to try it, but on grounds of public convenience and economy; and there may be nothing radically incongruous in a Subordinate Judge trying a suit below Rs. 2,500, whilst it would certainly be incongruous in a District Múnsif trying a suit, the value of which is over Rs. 2,500.

I think, therefore, that we must read s. 331 together with s. 15 and construe the special jurisdiction created as an exception to a rule of prohibition promulgated by s. 15 for the guidance of superior tribunals. This view receives, it seems to me, additional strength from the fact that, in cases of property attached, or purchased in execution of money decrees, and the value of which may exceed the pecuniary jurisdiction of the Court executing the decree, the right to revise by a suit the summary order which such Court is authorized to pass is preserved by ss. 283 and 335.

It should also be remembered that, until the Civil Courts Act came into operation and the jurisdiction of the District Múnsif and the mode of valuing suits cognizable by him were revised by it, the special jurisdiction section had no application to District Múnsifs. For, the value of claim tried under sections analogous to s. 331 could never exceed the value of the suit, of which it was a continuation. The Civil Courts Act dealt with the general

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jurisdiction and limited it in the case of other proceedings as well as in suits to Rs. 2,500. It never intended to give them jurisdiction in any case over Rs. 2,500. But if the contention as to the same rule being applicable to the converse case is to be upheld, we must hold that a District Múnsif may try a claim in excess of Rs. 2,500 contrary to paragraph 2, s. 12, of Act III of 1873. The fact is (and we are not bound to ignore it for the purpose of determining what is the correct rule of decision) that, whilst this Act was framed, the case raised by the contention was not foreseen and provided for. As to the view that the language of s. 331 is wide enough to include it, I do not see my way to adopt it, first, because we must place a reasonable construction upon s. 331 so as to obviate an incongruous result; secondly, we must read it as correlated to s. 15, which embodies a rule of prohibition applicable only to superior Courts; thirdly, because the claim is both a claim and a regular suit at the date of its presentation, and, in the absence of a special provision, the general rule as to the competent *forum* should be our guide. I, therefore, think that the case, *Muttammál* v. *Chinnana Gounden*(1), was correctly decided.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

1885.
August 6.

11 Mad. 288.
22 Cal. 506.
34 Mad 288
36 Bom 88
16 ... 1303
20 CLJ 285
43 Cal 574
All 130

RÁMÁ AND OTHERS (DEFENDANTS), APPELLANTS,

and

RANGA (PLAINTIFF), RESPONDENT.*

Hindú law—Widow—Alienation—Pious purposes—Spiritual necessities.

Although pilgrimages and sacrifices performed by a Hindú widow may be indirectly beneficial to her deceased husband, they are not ceremonies indispensable for his spiritual benefit. A sale by a Hindú widow to raise money for pious acts, not in the nature of spiritual necessities, unless such sale is reasonable in the circumstances of the family and the property sold is but a small portion of the property inherited from her husband, is invalid.

THIS was an appeal from the decree of C. Venkoba Ráu, Subordinate Judge of South Canara, reversing the decree of U. Subba Ráu, District Múnsif of Karkal, in suit 113 of 1883.

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(1) I.L.R., 4 Mad., 220.

* Second Appeal 228 of 1885.

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Ranga Bhatta sued as reversioner of Rámá Bhatta to recover certain land sold by his widow, Yamuni, to her father.

The defendants were the brothers of Yamuni.

The District Múnsif held that the sale was valid, having been made for the maintenance of the widow and for religious purposes.

On appeal the Subordinate Judge reversed this decree.

Defendants appealed.

Rámachandra Ráu Saheb for appellants.

Srinivása Ráu for respondent.

44 All. 503
27 Cwn. 653
37 C.L.J. 383

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (Muttusámi Ayyar and Parker, JJ.).

JUDGMENT.—The land in suit originally belonged to one Rámá Bhatta, and, on his death, it devolved on his widow in 1856. In the same year she sold it, together with the other property which she inherited from her husband, to her father for Rs. 201. It is recited in the sale-deed that, of this amount, Rs. 55 was paid on account of Rámá Bhatta's funeral obsequies and Rs. 146 was raised for her own spiritual benefit. The Subordinate Judge found that, shortly after the sale, the lady performed several pilgrimages and sacrifices. Seeing, however, that she sold all her husband's property to her own father in the same year in which she succeeded to it, he held that the sale was a fraudulent transaction. As to the advance of Rs. 55, he did not consider the evidence which the appellants adduced to be satisfactory. As to the pilgrimages and sacrifices performed by the lady, he observed that they were not such as justified the sale. Though the appellants alleged, in their written statement, that the purchase-money was applied also to the maintenance of the vendor, their pleader is unable to refer us to any evidence showing that such was really the case. It appears further from the sale-deed that the spiritual benefit contemplated by the lady when it was executed was her own. We are willing to admit that the pilgrimages and sacrifices performed by her are no doubt pious acts which might indirectly be beneficial to her husband, but they were not ceremonies which were indispensable for his spiritual benefit, such as his funeral obsequies and the periodical ceremonies incidental to those obsequies. We cannot recognize a sale by a Hindú widow as valid against her husband's reversioner, when it is made in view to raise money for doing pious acts which are not in the nature of spiritual necessities, unless such

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Rámá v. Ranga.

sale is reasonable in the circumstances of the family, and the property alienated is but a small portion of the property inherited from her husband. It is not contended that the income which the land in dispute yielded was more than Rs. 28 a year and that the whole of Rámá Bhatta's property was not included in the sale. We see no reason to doubt that the Subordinate Judge properly held that there was no necessity for the sale, such as would render it binding upon the respondent, and dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1885. May 2.

SADAYAPPA AND ANOTHER (PLAINTIFFS IN No. 7863 OF 1884),

and

PONNAMA AND ANOTHER (DEFENDANTS).*

17 Mad. 144.
20 Bom. 404.
21 Mad. 675.
45 Mad 103

Insolvency Act, 11 & 12 *Vic.*, c. 21, s. 7—*Vesting order—Civil Procedure Code*, s. 276—*Attachment before judgment—Official Assignee's title.*

Where a vesting order has been made under 11 & 12 Vic., c. 21, s. 7, after attachment and before decree, the title of the Official Assignee takes effect and prevents the attaching creditor from obtaining satisfaction of his decree by a sale—*Shib Kristo Shaha Chowdhry* v. *Miller* (1) and *Gamble* v. *Bholágir* followed.(2)

THIS was a case referred to the High Court, under s. 617 of the Code of Civil Procedure, by J. W. Handley, Chief Judge of the Court of Small Causes, Madras.

The case was stated as follows:—

"*Suits Nos.* 7863 *and* 9244 *of* 1884.

"These were suits by different plaintiffs against the same defendants for money due for goods sold and delivered. In both cases attachments before judgment had been made of certain bags of rice.

"After the date of these attachments but before decree, defendants were adjudicated insolvents and a vesting order was made.

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* Special Case 80 of 1884.

(1) I.L.R., 10 Cal., 150. (2) 2 Bom. H.C.R., 150.

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"Plaintiffs in both cases having obtained decrees proceeded to the sale of the bags of rice attached.

"After sale, the Official Assignee applied to have the proceeds of sale paid out to him.

"Notice was given to the parties to the suits, and after hearing the arguments on both sides I allowed the claim of the Official Assignee and directed the money to be paid out to him, but at the request of the plaintiffs' Counsel I made my order contingent on the opinion of the High Court.

"The question is whether the rights of the Official Assignee under a vesting order, issued after an attachment before judgment but before decree, override the right which the creditor attaching before judgment would have upon his obtaining a decree to have the decree satisfied out of the property attached. The precise point was decided in favour of the Official Assignee's rights by a Full Bench of the Calcutta High Court in a case reported in the Indian Law Reports, 10 Calcutta series, page 150, the Chief Justice and Mr. Justice Mitter dissenting. I have followed the judgment of the majority of the Calcutta High Court, the reasoning of which commends itself to my mind. I cannot see that the difference between the wording of the sections in the Codes of 1877 and 1882 relating to attachment before judgment and that of the corresponding sections of Act VIII of 1859 has the effect, attributed to it by the Chief Justice and Mr. Justice Mitter, of altering the law upon this point, which admittedly under the old Code had been clearly settled in favour of the Official Assignee. On the contrary, it seems to me that the words of the present Code, and particularly the provision in s. 489 that attachment before judgment shall not bar any person holding a decree from having his decree satisfied out of the property attached, show that attachment before judgment is not intended to transfer the property at all, or to give the attaching creditor any lien over it as against other creditors, but merely to transfer the possession to the Court so as to defeat fraudulent transfers by the debtor.

"Considering, however, the difference of opinion between the learned Judges of the Calcutta Court and that the question is one of great importance and has not, as far as I am aware, come before the High Court for decision, I think it right to refer the case for the opinion of the High Court.

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SADAYAPPA v. PONNAMA.

"The question, I would submit in these cases, is—Has the Official Assignee, under the circumstances detailed above, a right to receive the proceeds of sale of the property attached before judgment and sold in execution of the decrees."

Krishnáyyar (Solicitor) for plaintiffs.

King (Solicitor) for the Official Assignee.

The Court (Turner, C.J., and Muttusámi Ayyar, J.) delivered the following

JUDGMENT:—We understand the question referred to us to be whether, when a vesting order has been passed after attachment and before decree, the title created by the Insolvent Act in the Official Assignee takes effect and prevents the attaching creditor from obtaining the satisfaction of his décree by a sale.

We conceive that it would be dangerous to guide our decision by reference to the processes in execution under other systems of procedure. There appears to us material difference between the order of attachment issued under the Code of Civil Procedure and a writ of *fieri facias* in that the latter is an order for sale, the former is a step which may or may not be accompanied by an order for sale. It may be conceded that it is ordinarily the duty of the Court, which has issued an order for sale, to proceed to execute the decree, when passed, by the issue of a warrant for sale when application is made for that purpose; but it is also the duty of the Court to take notice of anything that may have occurred in the interim affecting the right of the defendant in the property which the Court, at the instance of the plaintiff, had attached with a view to prevent the alienation of it by the defendant. The effect of an attachment is declared in s. 276, after it has been duly effected—"Any private alienation of the property attached, whether by sale, mortgage, gift or otherwise, and any payment to the judgment-debtor, is void." The alienations against which the plaintiff is secured are private alienations by the defendant. Where the alienation is effected by operation of law, as in the case of a vesting order, the attachment cannot, in our judgment, prevent the operation of the Statute, and a Court executing a decree would be bound to take notice of it. Were we to hold otherwise, every creditor would be bound to bring a suit, and, if possible, he might apply for execution before the proceeds are realized so as to share in the distribution. The result of our ruling is to give effect to

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the policy of the Code, and we, therefore, hold in accordance with the views of a majority of the learned Judges of the High Court of Calcutta in *Shib Kristo Shaha Chowdhry* v. *Miller*,(1) and with *Gamble* v. *Bholágir*.(2)

The Chief Judge will be informed accordingly.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

RANOJI AND OTHERS (DEFENDANTS), APPELLANTS,

and

KANDOJI (PLAINTIFF), RESPONDENT.*

1884. November 18. 1885. May 2.

Hindú law—Sudras—Illegitimate son, Status and rights of—Suit for partition by illegitimate son of undivided brother against sons of other brothers.

In a joint Hindú family of the Sudra caste, consisting of three brothers, two died leaving legitimate sons and the third an illegitimate son.

In a suit brought by the latter for partition of the family estate against his father's brothers' sons:

Held, that he was not entitled to a share but only to maintenance.

THIS was an appeal from the decree of W. E. Clarke, Subordinate Judge, Nílgiris, dated 11th June 1884.

The plaintiff, Kandoji Ráu, sued the defendants, Ranoji Ráu and eight others, whom he alleged to be his father's brothers' sons, for possession of one-third of the family property and obtained a decree.

The defendants appealed to the High Court on the grounds *inter alia*, that the plaintiff was not the son of his alleged father and that, if he was, his mother was a concubine, and, therefore, plaintiff was not entitled to sue defendants for partition of the estate.

Mr. *Grant* for appellants.

Anandácharlu for respondent.

The facts necessary for the purpose of this report appear from the judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.).

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(1) I.L.R., 10 Cal., 150. (2) 2 Bom. H.C.R., 150. * Appeal 77 of 1884.

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RANOJI v. KANDOJI.

JUDGMENT.—One Nimboji Ráu, a Mahratta Sudra of Mysore, had three sons, named Gudubhai, Mukubhai, and Hirmanji. About thirty years ago they migrated from Mysore to Ootacamund, where they established themselves as mutton-butchers. It was conceded that Gudubhai and Hirmanji worked together and the appellants (defendants) are their sons and grandsons. Further, it is found by the Subordinate Judge that Mukubhai also lived with his brothers and carried on business with them jointly as a mutton-butcher, and that the property, of which a third share was claimed by the respondent (plaintiff), was jointly acquired by them. The evidence on this point is conflicting, and we see no sufficient ground for the contention that the Subordinate Judge has not arrived at a correct finding. The respondent asserted that he was the legitimate son of Mukubhai and claimed one-third share of the family property and an account of the profits of the business for the three years ending 31st October 1882, and a further account of the same until actual partition. It was alleged by the appellants that Mukubhai kept the respondent's mother, Nunni, but they contended that, after Mukubhai's death, Nunni became the concubine of one Esuf Sahib and subsequently gave birth to respondent. The Subordinate Judge has, however, found that the respondent was Mukubhai's son by Nunni, but that Nunni was not married to him. From this finding the respondent has preferred no appeal, and although it is impugned by the appellants, the weight of testimony is in favor of the conclusion at which the Subordinate Judge has arrived. We have then to determine whether the illegitimate son of a Sudra, who has died in coparcenary with his brothers, is entitled to demand from the surviving brothers any, and if any what, share in the family property, and the burden of proof is on the respondent to show that he is entitled under such circumstances to a share and to a share of the extent claimed by him.

We may premise the observations we have to make in the matter directly in issue by expressing our inability to concur in the opinion, which has been sometimes expressed that, among Sudras, marriage is no more than concubinage. Although what the Hindú law regards as the higher forms of marriage was not permitted to the Sudra, and although the wife of a Sudra does not acquire the right of assisting in sacrifices which can only be

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offered by a regenerate householder, Hindú law regarded the union as conferring a status on the wife distinctly superior to that of a concubine and entitling her and her offspring, to rights of succession, and, in the case of her offspring, of coparcenary which are refused to the concubine and her offspring.

It may no doubt be true that Hindú law has not been accepted by all the tribes who would fall within the general term Sudra, but among many classes of Sudras, who have accepted the Hindú law, we find a customary law which prohibits marriage with other classes or within certain degrees, and such rules imply a conception of marriage as something higher than a mere sexual union. All that we understand Baudháyana to mean in the text cited by West and Bühler, 376, is, a marriage may be contracted by Vaisyas and Sudras with but little regard to ceremonial, not that if a marriage is contracted with how little ceremony soever it will not create the rights attaching to relation of husband and wife. But while the Hindú law did not view the marriage relation of Sudras as mere concubinage, it conceded to the married Sudra many liberties, which would have been inconsistent with the religious life enjoined on the regenerate classes.

Thus in the collection of rules attributed to Manu, we find it declared that " a son begotten through lust on a Sudra by a man of the priestly class is even as a corpse: but a son begotten by a man of the servile class on his female slave or the female slave of his male slave may take a share of the inheritance, if permitted." Manu, chapter IX, ss. 178, 179. The translator adds "by the other sons," it may have meant, by the father. The illegitimate son then was at that time denied any right or even competency to take a share in his father's property, if he was the offspring of a man of the priestly caste begotten through lust on a Sudra; he was only declared competent to take a portion of the father's wealth, if he was begotten by a Sudra and he could not claim any portion as a matter of right. In course of time his position was more favorably regarded by the law. "A son begotten on a dási by a Sudra becomes even the partaker of a share by (the father's) choice; after the death of the father the brothers should make him a half sharer. An illegitimate son of a Sudra can take the whole unless there is a son to (any of) the daughters (of the Sudra). Yájnaválkya II, slokas 133, 134.

These texts are declared by Vijnanéswara to be a special rule

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RANOJI v. KANDOJI.

concerning the partition of a Sudra's goods, who declares that the son begotten by a Sudra on a slave girl obtains a share by the father's choice; that after the father's death, if there are sons of a wedded wife, they must give him half as much as the amount of one brother's allotment, and that if there are no such sons, he will take the whole estate unless there be daughters of a wife or sons of daughters, in which case he will participate for half a share only. Mitákshará I, s. 12. The author of the Madhaviya refers to the texts of Yájnaválkya, and he too adds the qualification that the illegitimate son of the Sudra takes the whole wealth only if there are neither sons nor daughters by a wedded wife nor the children of sons or daughters. (Burnell's Translation, page 24.) The rule is stated in the Dáyabhága, ch. IX, s. 31, as follows:—"Even a son begotten by a Sudra on a female slave may take a share by the choice of the father, but if the father be dead, the brother should make him partaker of half a share. Begotten on an unmarried woman and having no brother he may take the whole property, provided there be not a daughter's son...... But if there be a daughter's son, he shall share equally with him, for no special provision occurs; and it is fit that the allotment should be equal, since the one, though born of an unmarried woman, is son of the owner, and the other, though sprung from a married woman, is only his daughter's son."

It appears in the following terms in the Dáyakrama Sangraha ch. VI, s. 33:—"The son of a Sudra by a female slave may, at the will of his father, be rendered an equal share with the son born of his wedded wife; on the decease of his father he is entitled to half a share;—in default of such a brother and of a daughter's son, he is entitled to the whole of his father's wealth: but if there be a daughter's son he must be an equal sharer with him." (Stokes, p. 513.) Nilakanta Bhatta quotes the text of Yájnaválkya and observes that by "specifying by a Sudra, it is clear that a son begotten by a twice-born man on a female slave does not obtain a share even by the father's choice. Neither after the death of the father will he get half, nor in the absence of sons or other (heirs) will he get the whole." Vyavahára Mayukha, ch. IV, s. IV, p. 32.

He thus inferentially recognizes the right of the son of a Sudra to a half share, though sons or some other heirs exist, but he does not specify who the other heirs are. (Stokes, p. 55.)

Devanna Bhatta quoting the texts of Manu and Yájnaválkya

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proceeds: "If, according to authority, where there may be no son of the wife and the rest, but there may be a wife and a daughter, the daughter's son be entitled to share (with the son by a female slave), the rule for the succession of the daughter or other proper heir would be infringed, therefore, if any dower to the daughter's son exist, the son by a female slave does not take the whole estate, but on the contrary shares equally with such heir. Dattaka Chandriká, s. V, § 31. (Stokes, p. 660.) In the learned work by Messrs. West and Bühler, it is suggested that by the earlier writers the wife and the daughter were intentionally omitted: that the rule securing a provision for the illegitimate son begotten by a Sudra on a slave was established at a time when the daughter's son and even the daughter was made equal to a man's own son, while the widow was still unprovided for or reduced to a lower place. (West and Bühler, 84.)

We hesitate to accept the view that Vijnanéswara intended to postpone the widow to the illegitimate son. He had already provided that the legitimate sons were to give shares to the widow and had recognized the right of the widow as superior to that of a daughter or daughter's son, though doubtless in virtue of expressed texts. In treating of the rule we are discussing he brings in daughters who were not mentioned by Yájnaválkya, and it is possible that he may here, as he has done in a well-known passage, not have intended to state completely the sons of superior heirs, or that the case of the survival of a widow may have escaped his attention. Nilakanta Bhatta appears to have understood that all heirs down to the daughter's son, who, under the ordinary law, are recognized as entitled to inherit, would not be altogether superseded by an illegitimate son and the language of Devanna Bhatta is explicit.

Such are the rules which we can collect from the commentators as to the succession of the illegitimate son of a Sudra (not being a son born in adultery), and, where his father has died "vibhakta" or separated, there can be no question that the right of the illegitimate son extends not only to his father's acquisitions, but to ancestral property which may have come to the father's hands.

All the texts we have cited are found in those portions of the several works which relate to the partition of the estate of separated house-holders. Do the same rights accrue to a son of a Sudra

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when his father is unseparated? We can find no Hindú authority on this subject, and Messrs. West and Bühler are the only English writers who affirm that they do, but when we look at the authorities cited in support of their opinion, we find they do not support the view.

In the case cited in Bk. I, ch. II, s. 1, Q. 4, a Kumbi had transferred to a son described as a foster-son his immovable property. The Kumbi was presumably the sole owner and separated from his brother. In the case cited in Bk.I, ch. II, s. 3, Q 1, the question put to the pandit was simply "can a son of a Sudra female slave be his heir," which the pandit answered in the affirmative and quoted the passage in the Mitákshará, to which we have referred. The case cited in Bk. I, ch. II, s. 3, Q. 3, is similarly inconclusive. On the other hand at Bk. I, ch. II, s. 3, Q. 6, when the pandit was asked if a kept woman's son would be preferred to a cousin, he replied that "as the deceased was separate from his relatives and as he was of the Sudra caste, his illegitimate son would be his heir.

So also in the following case, Q. 7, where a man of the Mali caste left an illegitimate son and a nephew, the pandit declared that the claim of the illegitimate son was valid as it appeared that the man lived separate from his brothers. The case cited in Q. 8, where it was held that the illegitimate son of a Sudra would take the whole estate in preference to the widow, is founded on the strict construction of the text of the Mitákshará, which, for reasons we have already given, we consider should not be accepted in this Presidency. We may observe that Varadarájá declares the rule in terms that might include the widow and daughters, "in every case it must be understood that the succession of a dási's son to the property is in default of ordinary or excellent sons, sons' sons, daughters' sons, &c. (Burnell, p. 22.)

If, in the absence of any rule, we are to be guided by analogy, it does not appear that the claims of the illegitimate son to half a son's share can be sustained against the undivided brothers of his father. We cannot accede to the arguments that an inference can be drawn from the place in which the author of the Mitákshará deals with the rights of an illegitimate son. The passage is introduced as a special rule. The illegitimate son of a separated man of the regenerate classes has a right only to maintenance; the illegitimate son of a Sudra has no right in his father's lifetime,

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but if there be no heirs, within certain degrees, he may take the whole estate after his father's death. There is nothing in the context to show that the preceding rules regarding legitimate sons were to apply to the illegitimate sons of the Sudra. The special rule is introduced in the place which it would occupy with equal propriety if the preceding rules had no application to him. The illegitimate son, it will be observed, does not by birth become a coparcener. He is ordinarily entitled only to maintenance, and in the case of Sudras this right to maintenance is in certain cases to be satisfied by the allocation not of a share but of a portion of the estate equal to half a share. The widow at one time enjoyed a similar right. It is difficult to see on what ground the claims of the illegitimate son upon the coparcenary estate of the father and the father's brothers can be placed above those of the widow, the daughter and the daughter's son. If the daughter and widow can claim only maintenance, because the coparcenary property remains a unit in the hands of the surviving brothers, it is to be assumed that the result would be the same in the case of illegitimate sons. The only arguments adduced against this view is that the illegitimate son would occupy a worse position where the father left an undivided brother or nephew than where being separated from collaterals he left an undivided son. The answer appears to be that the property of a father separated from his brothers may well be subject to discharge an obligation to which it would not have been subject in the hands of unseparated brothers. The family estate could not be made liable for the private debts of a deceased coparcener. When the deceased has left a son, there attach to the son personally and to the estate taken by him obligations which he must meet out of all he received as his father's representative. If two brothers were undivided and one died leaving a son, who remained in coparcenary with his uncle, and the other died leaving a widow, the widow would have only a claim for maintenance on the nephew, whereas if her husband had been separated and had left a son, she would under the older law have been entitled to a portion equal to a share.

On these grounds, in accordance with a previous decision of this Court in *Krishnayyan* v. *Muttusámi*,(1) we arrive at the conclusion

(1) I.L.R., 7 Mad., 407.

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that the claim of the respondent is limited to maintenance. The decree of the Court of First Instance is reversed and the claim dismissed, but under the circumstances we shall direct each party to bear his own costs.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan (Officiating Chief Justice), Mr. Justice Muttusámi Ayyar, and Mr. Justice Hutchins.

1885. May 2. July 13.

12 Bom. 449.

REFERENCE FROM THE BOARD OF REVENUE UNDER S. 46 OF THE INDIAN STAMP ACT, 1879.*

Stamp Act, ss. 34, 50.

Where a document has been admitted in evidence as duly stamped, such admission can only be called in question by the Appellate Court under s. 50 of the Indian Stamp Act.

THIS was a reference made under s. 46 of the Indian Stamp Act, 1879, by the Board of Revenue.

The resolution of the Board, dated 27th February 1885, was as follows:—

"The Board resolve, under the provisions of s. 46, Act I of 1879, to refer the following case, which has come to its notice, for the orders of the High Court:—

"In the course of certain civil proceedings, the District Judge of Chingleput admitted in evidence an instrument after assessing the stamp duty payable thereon and levying a penalty under cl. 1, s. 34, but failed to send the Collector an authenticated copy of the instrument duly certified as to payment of duty and penalty as provided in s. 35.

"Eight days thereafter the Court, in revision of its own proceedings, recorded a declaration under s. 50 setting forth, under a repealed enactment of 1816, the liability of the deed to a stamp duty of Rs. 50 and levied a penalty of Rs. 500, in default of payment of which the Court impounded the document and sent it to the Collector, in original, for disposal according to law.

"Subsequently, the case was re-opened on application of the parties, when the Judge formally repudiated his own revisional proceedings.

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* Referred Case 2 of 1885.

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"These proceedings are distinctly in violation of the provisions of cl. 3, s. 34 of the Act, and it is equally clear that the Judge was powerless to pass a declaratory order under s. 50, as that section limits interference to the Appellate Court which is at liberty to take action either of its own motion or at the instance of the Collector. REFERENCE UNDER STAMP ACT, s. 46.

"The Judge's statement that the document was admitted provisionally is not understood, as the law admits of no such provisional admission.

"The Board are unable to remit the penalty under s. 42, as that section has reference only to penalties levied under ss. 34 and 37, whereas the penalty in question was, on the face of it, levied in pursuance of a declaration under s. 50.

"Under these circumstances, the Board resolve to forward the case for the orders of the High Court, with the request that they will pass such revisional orders on the proceedings of the District Judge as may be deemed advisable."

Mr. *Powell* (Acting Government Pleader) appeared on behalf of the Board of Revenue.

The Court (Kernan, Offg. C.J., Muttusámi Ayyar and Hutchins, JJ.) delivered the following

JUDGMENT :—The Judge's order of the 26th September cannot be supported and it must be set aside. The document was tendered in evidence on the 18th September. The Judge considered it together with the other evidence before him and made an order allowing the claim which the document was produced to support. The document was then received in evidence and acted upon, and the claim was disposed of on the 18th September.

We do not understand clearly what the Judge means when he states that the document was not read in evidence and that little or no use was made of it. In the order which he made on the claim petition, it is stated that " the claimants put in old deeds A and B which prove *primâ facie* that these immovables in fact have been set apart and reserved for some purpose and cannot be treated as belonging solely to the defendant."

When A was tendered in evidence, the pleader undertook to pay Rs. 11 for the duty and the penalty and he paid them accordingly on the same day, as appears from the order of the 20th October.

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REFERENCE UNDER STAMP ACT, s. 46.

Then, on the 26th September, the District Judge came to the conclusion that the proper amount payable on the document was Rs. 550 and he endorsed on it an order requiring the payment of Rs. 539 within fourteen days. The section under which this order or declaration was made is not stated in the order itself, but the copy transmitted to the Collector is headed "Declaration under s. 50 of Act I of 1879," and in his proceedings of 20th October, with which he forwarded the document to the Collector, the District Judge himself described it as a declaration made under s. 50 of the Stamp Act and referred to the document as one which had been impounded and was transmitted under that section. As an order under that section it was manifestly illegal, since s. 50 only applies to a Court of Appeal or Reference reviewing an adjudication by an inferior Court.

But the Judge wishes his order of the 26th September to be treated as itself an adjudication under s. 34 of the stamp duty and penalty leviable. It seems to us that this is impossible. He had admitted the document in evidence and proceeded to judgment on the 18th September and he was *functus officio*. When an instrument has been admitted in evidence and judgment delivered, its admission can only be called in question in a proceeding under s. 50.

We accordingly quash the order of the 26th September.

We desire to inform the Judge that he is misinformed as to the practice of the High Court, and that, if in any case the stamp is examined by an officer of the Court and a question raised as to its sufficiency, the Court adjudicates on it before admitting the document in evidence and acting upon it.

We are unable to say that, having regard to the distinct statements on the face of the proceedings signed by the Judge, the Board of Revenue and the Collector were not justified in making this reference.

The late Chief Justice and Mr. Justice Brandt heard this case with us and assented to this judgment.

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APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

SARANGAPANI (PLAINTIFF No. 1), APPELLANT,

and

NÁRÁYANASÁMI (DEFENDANT No. 1), RESPONDENT.*

1885. April 17.

13 Mad. 178.

Civil Procedure Code, ss. 623, 624—Review of judgment—Abolition of Court—Business transferred to another Court.

Section 624 of the Code of Civil Procedure must be read as a proviso to s. 623.

Held, therefore, that, when a Court had been abolished and its business transferred to a Court presided over by another Judge, such Judge should not entertain an application for review of judgment except in the case provided for by s. 624.

THIS was an appeal from an order of J. Hope, District Judge of South Arcot, setting aside the decree of Ádiappa Chettyar, Subordinate Judge at Cuddalore, in suit 43 of 1883, on review of judgment.

The application for review of judgment was made by defendant No. 1, Náráyanasámi Grámini, to the District Court, because the Subordinate Court had been abolished and its records transferred to the District Court. The chief ground for review alleged in the application was that the decree had been passed on a compromise extorted from defendant No. 1.

The District Judge found that the grounds set forth in the application were not deserving of much weight, but set aside the decree on the ground that the Subordinate Judge had not decided (1) whether the suit was maintainable, (2) or whether the plaint had been filed on a proper stamp.

Issues had been raised on both of these questions and the Judge was of opinion that both of these issues should have been found in the affirmative before the suit could be proceeded with.

Plaintiff No. 1 appealed to the High Court on the grounds, *inter alia*—

* Appeal against order 13 of 1885.

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SARANGAPANI v. NÁRÁYANA-SÁMI.

(1) That the District Judge had no power to entertain or grant a review of judgment under the circumstances.

(2) That the suit was properly brought.

(3) That it was open to the parties to compromise the suit in spite of the technical objections taken by defendant No. 1.

Bháshyam Ayyangár for appellant.

Hon. *Rámá Ráu* for respondent.

The Court (Muttusámi Ayyar and Hutchins, JJ.) delivered the following

JUDGMENT.—The first contention is that the Judge's order is bad, because the application on which he acted was one for review on another ground than those mentioned in s. 624, and he is not the Judge who passed the decree.

In our opinion this objection must prevail. It has been argued on the other side that the 5th clause in s. 623 permits an application to the Court to which the business of an abolished Court has been transferred upon any of the grounds on which reviews are allowable. But the very same clause speaks of the Court, not the Judge, which passed the decree. Section 624 must be read as a proviso to both parts of the clause: when there has been a change of the presiding Judge, no application can be made to the new Judge, whether of the Court which passed the decree or of that substituted for it, except on the grounds stated.

The District Judge, however, has set aside the decree on a ground not taken by the party, viz., that before the decree was passed it should have been determined whether it was a proper case to grant a declaration and whether the stamp was correct. If these objections are tenable at all, they should be raised by an appeal; but there can be no doubt that the declaration asked for might properly have been granted, and it is not clear that the stamp is insufficient, for it appears to have been paid both for the declaration and on the property actually with the defendants and sought to be recovered.

The District Judge's order must be reversed and the respondent will pay the costs of his application for review as well as of this appeal.

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15 Mad. 3.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1884. November 12. 1885. February 24.

CHIKATI ZAMÍNDÁR AND OTHERS (DEFENDANTS), APPELLANTS,

and

PEDDAKIMEDI ZAMÍNDÁR (PLAINTIFF), RESPONDENT.*

Regulation XII of 1816—*District panchâyat*—*Regulation VII of* 1816—*Act III of* 1873.

Neither the total repeal of Regulation VII of 1816 by Act III of 1873 (Madras Civil Courts' Act) nor the partial repeal of Regulation XII of 1816, so far as it contained words of reference to Regulation VII of 1816, abolished the jurisdiction of district panchâyats.

A Collector cannot order a reference to a district panchâyat under Regulation XII of 1816 unless there has been (1) an enquiry as to whether the parties will submit to the jurisdiction of a village panchâyat; (2) an objection from either party to such reference, and a request in writing by one of the parties that the matter be referred to a district panchâyat.

THIS was an appeal from the decree of J. R. Daniel, District Judge of Ganjam, in suit No. 3 of 1884.

The plaintiff, Sri Vira Sri Víradhi Vira Pratapa Sri Laksmi Náráyana Ananga Bhima Deo Kesari Mahárázulu Gáru, zamíndár of Peddakimedi, sued Visvambara Rájendra Deo, zamíndár of Chikati, and seven others to set aside a decree of a district panchâyat, dated 6th January 1883, and to recover certain villages taken possession of by defendant No. 1 on the strength of the said decree. A dispute having arisen regarding the boundary between portions of the zamíndáries of Peddakimedi and Chikati, the Chikati zamíndár (defendant No. 1) presented to the Collector (defendant No. 2) a plaint under s. 4 of Regulation XII of 1816, and the Collector forwarded the plaint under s. 5, cl. 7 of the said Regulation to the district múnsif of Berhampúr (defendant No. 3), with an order to assemble a district panchâyat under Regulation VII of 1816 to settle the dispute.

* Appeal 47 of 1884

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The district múnsif accordingly convened a pancháyat of defendants 4—8, who passed a decree under that Regulation.

The District Judge held that the decree of the pancháyat was illegal because Regulation VII of 1816 having been repealed by the Madras Civil Courts' Act, 1873, the Collector had no power to make the reference.

The suits were dismissed with costs against defendant No. 1; the other defendants to bear their own costs.

Defendants appealed on the following grounds:—

(1) Regulation XII of 1816 has not been repealed.

(2) The decision of the pancháyatdárs was a good, valid, binding and final decision.

(3) The plaintiff's suit was not maintainable.

Mr. *Bránson* for appellants.

Mr. *Michell* for respondent.

The Court (Turner, C.J., and Muttusámi Ayyar, J.) delivered the following

JUDGMENT:—Two questions are raised for decision in this appeal, viz., (1) whether Regulation XII of 1816 is still in force so far as it relates to district pancháyats, and (2) whether the conditions necessary to give them jurisdiction exist in this case. As to the first, the Judge has come to the conclusion that district pancháyats have ceased to exist as a legal tribunal for all purposes, but in this opinion we are unable to concur. Neither the total repeal of Regulation VII of 1816 nor the partial repeal of Regulation XII of 1816, so far as it contained words of reference to Regulation VII of 1816, warrants the inference that the jurisdiction created by the later enactment has been abolished. The one created a general jurisdiction and the other a special jurisdiction, and we see nothing incongruous in the Legislature abolishing the one and retaining the other, and thereby converting a tribunal which had a general and a special jurisdiction into a tribunal which has a special or limited jurisdiction only. Regulation VII of 1816 was in part incorporated with Regulation XII of 1816, but it should be remembered that, when the one is repealed and the other is allowed to stand, the rule of construction is that the portion of the repealed enactment which has been incorporated is to be read as part of the enactment with

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which it has been incorporated and which is still in force—see *The Queen* v. *Inhabitants of Merionethshire*,(1) *The Queen* v. *Stock*.(2)

Again, it was not within the purview of Act III of 1873 to enumerate all judicial tribunals, and it is not to be inferred that because district pancháyats are not expressly named by it as a judicial tribunal, they have ceased to exist. Village múnsifs and village pancháyats are similarly not enumerated, but it is not denied that they still exist as special tribunals for certain purposes. The substantial question, then, is one of intention to be ascertained from the language of Regulation XII of 1816 as modified by its partial repeal. The sections which conferred jurisdiction on district pancháyats in the cases mentioned in Regulation XII of 1816 have not at all been modified or repealed. Section 2, Regulation XII of 1816, still authorizes district pancháyats to hear and determine such suits as may be referred to them by Collectors under that Regulation through district Múnsifs; s. 4, cls. 1 enumerates among the claims which the parties may prefer to the Collector under this Regulation claims to lands, the validity of which may, as in the case before us, depend on the determination of an uncertain and disputed boundary or land-mark; and s. 5, cls. 6, 7 and 8 prescribe the conditions subject to which the Collector is to refer the claim to village and district pancháyats respectively. These provisions are left to stand, and the partial repeal does not touch them. Again, the retention of the word 'district' in s. 6, cls. 1 and 4, s. 10, and s. 12 shows that it was the intention to retain district pancháyats as a judicial tribunal. Moreover, s. 10, which provided for the execution of decrees of district pancháyats in cases referred to them under Regulation XII of 1816, is left to stand, and the inference appears irresistible that district pancháyats are intended to retain their jurisdiction under the Regulation. This being so, the construction which ought to be placed on the other sections must be such as will execute and not defeat that intention. The modifications of Regulation XII, which were relied on at the hearing as material to the question under consideration, are those of s. 6, cls. 1 and 2, and of s. 11. Act XII of 1876 repeals the first clause of s. 6 in so far as it relates to Regulation VII of 1816. Giving effect to

(1) 6 Q.B., 346. (2) 2 A. & E., 407.

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the modification and omitting from the clause all that it contains relating to Regulation VII of 1816—for it is to be noticed that it is not only the words "Regulation VII of 1816" which are to be omitted—the result will be that the pancháyats are to be assembled and their proceedings are to be conducted according to the general rules enacted in Regulation V of 1816. Act XII of 1876 also repealed the words in cl. 2, s. 6, "Without requiring the agreement specified in cl. 2, s. 4, Regulation VII of 1816." Those words had no other effect in the Regulation as it originally stood than repeating in substance what is enacted by cl. 7, s. 5, and explaining it by reference to a provision of Regulation VII of 1816 which rendered mutual consent a prerequisite of the general jurisdiction which vested in district pancháyats under that Regulation. The other modifications of the Regulation are immaterial for our present purpose. We therefore hold that district pancháyats have still jurisdiction under Regulation XII of 1816, and that the procedure to be followed is that prescribed in regard to village pancháyats by Regulation V of 1816, except in so far as it is expressly modified by Regulation XII of 1816 as it now stands.

As to the second point, we have come to the conclusion that the award cannot be upheld, for the procedure prescribed by s. 5, cls. 6 and 7, has not been followed. According to cls. 6, the Collector was bound to have enquired, when the defendant denied the claim, whether the parties would mutually consent to have the cause investigated and decided by a village pancháyat, and cl. 7 declares that, if either the plaintiff or defendant shall object to the reference of the cause to be tried and determined by a village pancháyat, and either of them shall desire in writing that it may be referred to be tried and decided by a district pancháyat, the Collector, whether the other party agrees to such reference or not, shall forward the plaint to the competent district músnif to assemble a district pancháyat to investigate and determine the suit. An enquiry as to whether the parties will submit to the jurisdiction of a village pancháyat, an objection from either party to such reference, and a request then made by one of the parties in writing that the matter in dispute be referred to a district pancháyat, are conditions precedent to the exercise by the Collector of his power to order a compulsory reference to a district pancháyat. In the

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case before us there was no mutual submission to a district panchâyat, nor was any enquiry made as to whether the contending parties would consent to have the matter heard and determined by a village panchâyat. Under these circumstances, the Collector had no power to direct the district Múnsif to assemble a district panchâyat and his order is *ultrâ vires*, and moreover the panchâyat was not assembled and did not proceed according to the rules prescribed by Regulation V of 1816.

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For these reasons we must affirm the decree and dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

1885. July 22, 30.

16 mad. 480

SUBRAMANYA (DEFENDANT No. 1), APPELLANT,

and

RÁJARÁM (PLAINTIFF), RESPONDENT.*

Rent Recovery Act, s. 38—Civil Procedure Code, ss. 276, 295—Sale of tenant's interest by landlord pending attachment by Civil Court.

The interest of a tenant in certain land having been attached by his creditor in execution of a decree for money, the landlord attached the same land for arrears of rent, brought it to sale, and purchased it under the provisions of the Rent Recovery Act.

The creditor subsequently purchased the interest of the tenant, which was sold in execution of his decree. In a suit by the landlord to have the sale to the creditor declared invalid:

Held, that the landlord's purchase was subject to the creditor's attachment.

This was an appeal from the decree of T. Weir, Acting District Judge of Madura, confirming the decree of A. Kuppusámi Ayyangár, District Múnsif of Paramagudi, in suit 98 of 1884.

The plaintiff, T. Rájarám Ráu, manager of the Ramnád zamíndárí, sued for a declaration that a sale of certain land made in execution of a money-decree obtained by defendant No. 1 (Subramanya Chetti) against defendant No. 2 (Sámi Tévan) was invalid, and that the land belonged to the zamíndárí. The land which had been in the possession of defendant No. 2, a tenant of the zamíndárí, was attached for arrears of rent and sold on the 9th of December

* Second Appeal 155 of 1885.

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SUBRAMANYA v. RÁJARÁM.

1881 and bought by the plaintiff. Defendant No. 1 pleaded that the sale to plaintiff was invalid, because in February 1880 he had attached the land in execution of a decree against defendant No. 2, and had brought it to sale and purchased it in 1882.

The plaintiff contended that the attachment gave defendant No. 1 no lien and only prevented private alienations by the judgment-debtor from taking effect. He relied on s. 276 of the Code of Civil Procedure. The Múnsif decreed for plaintiff, citing s. 295 of the Code as showing that no lien could be created by attachment as against other creditors.

On appeal the District Judge also held that no charge was created on the land by s. 276 beyond forbidding private alienation.

Defendant No. 1 appealed on the ground that at the date of the purchase by plaintiff under Act VIII of 1865, s. 38, the tenant had no saleable interest in the land, inasmuch as the land was then under attachment by a Civil Court.

Bháshyam Ayyangár for appellant.

Mr. *Powell* (Acting Government Pleader) for respondent.

The Court (Muttusámi Ayyar and Parker, JJ.), delivered the following

JUDGMENT.—The respondent (plaintiff) is the manager of the Ramnád zamíndárí, and defendant No. 2, who is not a party to this appeal, is a tenant in that estate.

Defendant No. 1 (appellant) obtained a money-decree against the defendant No. 2 in Original Suit 291 of 1877 on the file of the Sivaganga Múnsif, and in execution of the same attached his interest in the land in dispute in March 1880 and purchased it some time subsequent to October 1882. During the interval, the respondent attached the same land for arrears of rent due for Fasli 1278, and bought it in December 1881 under Act VIII of 1865. Thus the respondent's attachment and purchase were prior to the appellant's purchase, but subsequent to his attachment. The Courts below held that this attachment created no lien in his favor, and that the whole interest of the tenant in the land passed to the respondent by the sale under Act VIII of 1865. We are unable to concur in this opinion. The power conferred upon the landlord by s. 38 of Act VIII of 1865 is a power to sell for arrears of rent the tenant's saleable interest, that is to say, the interest which the tenant could convey by private alienation either by express contract

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with the landlord or by the usage of the country. But in our judgment there is nothing in this section to show that the sale authorized by it is a sale free of prior incumbrances and disabilities, as in the case of a sale for arrears of revenue due to Government under Act II of 1864. Section 2 of that Act declares that the land on which arrears of revenue are due shall be regarded as the security of the public revenue, and s. 42 enacts that lands brought to sale for arrears of revenue shall be free of all prior incumbrances, but Act VIII of 1865 contains no such provisions. The words "when by express contract or by the usage of the district, the defaulter may have a saleable interest in the land" only prescribe a condition precedent, viz., that the defaulter must have a disposing power in order that the landlord might proceed against him under that section. In *Vîrappa* v. *Kathana*(1) it was held by this Court that the landlord had no lien for rent on the tenant's holding. It was also decided by a Full Bench of this Court in *Rájagopal* v. *Subbaráya*(2) that the sale under Act VIII of 1865 was not free of prior incumbrances. It follows then that the landlord could only sell the tenant's interest, such as it was at the date of his attachment and sale, and that his power under s. 38 is nothing more than the power which an execution-creditor ordinarily has over his debtor's property. It is then said that s. 276 of the Code of Civil Procedure creates no lien or charge in favor of an attaching creditor, but that it creates only a disability as against the judgment-debtor. In the view which we take of the landlord's power under s. 38 of Act VIII of 1865, he could only stand in the place of the tenant, and bring to sale for arrears of rent such interest as the tenant had power to sell at the date of the attachment and sale. This interest the tenant had no power to alienate to the prejudice of any claim enforceable under the attachment, and the landlord could not do more. It is therefore immaterial for purposes of this appeal whether s. 276 of the Code of Civil Procedure creates a lien or charge on the property under attachment or only a disability as against the judgment-debtor. We must therefore hold that the respondent's purchase was subject to the appellant's attachment. It may be that the interest which remained in the tenant, if any, after satisfying the appellant's decree passed to the respondent by his prior purchase. But the suit from which this

(1) I.L.R., 6 Mad., 428. (2) I.L.R., 7 Mad., 31.

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second appeal arises was not instituted to redeem the property from the appellant.

We set aside the decrees of the Courts below and direct that the suit be dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

RÁMÁ (Plaintiff), Appellant,

and

VENKATÁCHALAM and another (Defendants), Respondents.*

1885. July 22, 27.

Rent Recovery Act, ss. 3, 4, 9—Landlord and tenant—Right to enforce acceptance of pattá.

The renter of a zamíndárí, to whom the right to collect the kattubadi or quit-rent on inám lands and the road-cess payable to Government was delegated, sued to compel the inámdárs to accept pattás and execute muchalkás for the amounts due:

Held, that the inámdárs, not being cultivating tenants, were not bound, under Act VIII of 1865 (Madras), to accept a pattá.

Rámásámi v. *The Collector of Madura* (I.L.R., 2 Mad., 67) referred to.

This was an appeal from the decree of E. C. Johnson, Acting District Judge of Vizagapatam, confirming the decree of V. Appala Narasimha Rázu, District Múnsif of Parvatipúr, in suit 144 of 1884.

Mr. *Branson* for appellant.

Anandácharlu for respondents.

The facts necessary for the purpose of this report appear from the judgment of the Court (Muttusámi Ayyar and Parker, JJ.).

Judgment.—The appellant is the renter of the Merangi zamíndárí in the district of Vizagapatam and the respondents are agrahárамdárs holding ináms in that estate. The zamíndár is a minor and the estate is under the management of the Court of Wards. The jiraiti or assessed lands in the zamíndárí were leased to the appellant and he was also authorized to collect the kattubadi and the road-cess payable to Government on the inám lands, some deduction being allowed to be made from the amount due to Government as a remuneration for his trouble. It is conceded, at the hearing, that the respondents are not cultivating tenants. The

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* Second Appeal 156 of 1885.

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appellant brought the suit, from which this appeal arises, partly to compel the respondents to accept a pattá and to execute a muchalká under Act VIII of 1865. The question raised for decision was whether this claim could be maintained. Both the Lower Courts held that it could not. The District Múnsif observed that the appellant's position was that of a person deputed to make collections for a stipulated remuneration and not that of a landlord within the meaning of s. 3 of Act VIII of 1865. In advertence to the fact that the respondents were not cultivating tenants, the Judge observed that the provisions of the Act did not extend to superior tenancies, such as that of the respondents, and relied on the decision of the Privy Council in *Rámasámi* v. *The Collector of Madura.* (1) In that case the contention was that a favorable lease granted by a former zamíndár of Ramnád to his creditor for a period of forty years was a pattá as defined by s. 3 of Act VIII of 1865, and, therefore, not a subject of compulsory registration under Act XX of 1866. In overruling this contention, the Judicial Committee observed that s. 3 contained a description and not a definition, that it seemed to be confined to the relation of tenants who are cultivating the land and their immediate landlords, and that ss. 3, 4 and 9 were framed upon the assumption that there was an existing relation which would warrant the application by either party for a written pattá. This decision was followed by this Court in Appeal 8 of 1881.

In the case before us, the respondents are not cultivating tenants, and, therefore, they are under no obligation to accept a pattá. Again, the appellant asserts a claim to the kattubadi and the road-cess, not in virtue of his position as a farmer, but on the ground that the power to collect them was specially delegated to him, and it is not urged that the relation of landlord and tenant exists between the parties within the meaning of s. 3. The learned Counsel for the appellant suggests that the remarks of the Privy Council amount to a mere *obiter dictum.* But a reference to the facts of the case in which those remarks were made shows that they were necessary for the disposal of the contention before the Judicial Committee. This appeal must fail and we dismiss it with costs.

(1) I.L.R., 2 Mad., 67.

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possession of the family land and protect the females:—*Held*, that the senior female, assuming that she was *de jure* yajaman, could not arbitrarily revoke this arrangement.

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See RES JUDICATA, 5.

7. ——————, s. 13—*Explanation* 5:

In 1881 A sued B, C, and others for damages for the loss of his crops by the diversion of a water-channel by the defendants. A claimed a right common to himself and other raiyats of his village to use the water during the day time under an arrangement, by which B, C, and the other defendants in the suit were entitled to use the water during the night time. In 1882 A and four other raiyats, not parties to the former suit, sued B, C, and thirteen others, not parties to the former suit, for a decree declaring that the plaintiffs were entitled to the exclusive use of the water in the channel by day. The Lower Courts held that the suit was barred by section 13 of the Code of Civil Procedure:—*Held*, that as between the plaintiffs other than A and the defendants, and as between A and the defendants other than B and C, the suit was not barred by section 13 of the Code of Civil Procedure.

Thánakoti v. *Muniappa* 496

8. ——————, s. 13—*Hindu Law*—Res judicata—*Representation of estate by Hindú widow—Decree in favor of widow—Suit by reversioner—Admission by widow subsequent to decree, not binding on reversioner:*

In 1877, S claiming to be the adopted son of M, sued A, the widow of M, to recover his estate. A denied the adoption. S failing to adduce any evidence, the suit was dismissed under section 158 of the Code of Civil Procedure, 1877. In 1882 by an agreement made between A and S, A acknowledged the title of S as adopted son of M. A having died, a suit was brought against S by a reversioner of M to recover the estate of M:—*Held*, that S was estopped by the decree in the former suit from setting up his claim as adopted son against the plaintiff, and that the subsequent agreement between A and S did not affect plaintiff's right.

Arunáchala v. *Panchanádam* 348

9. ——————, s. 26—*Misjoinder—Amendment of plaint—Specific Relief Act, s. 42—Declaratory suit:*

Suit by six plaintiffs praying for a declaration that certain proceedings of a District Temple Committee removing them from office as trustees of a temple were illegal. Defendants pleaded that the suit would not lie because of misjoinder and also because further relief might have been sought:—*Held* that, under section 26 of the Code of Civil Procedure, the plaintiffs could not sue jointly and that the plaint should be returned for amendment, one of the plaintiffs to be allowed to use it as his own:—*Held*, also, that unless there had been an actual ouster from office, a declaratory suit would lie.

Rámánúja v. *Devanáyaka* 361

10. ——————, ss. 32, 368—*Death of respondent in appeal—Rival claims to represent deceased:*

Although a Court is bound by section 368 of the Code of Civil Procedure to place on the record the name of the person alleged by the appellant to be the legal representative of a deceased respondent, nevertheless, where a person, other than the person alleged by the appellant to be such representative, claims, on good *primâ facie* grounds, to be the representative of the deceased respondent, and the interests of the person entitled to the estate of the deceased may be prejudiced, the Court should, under section 32 of the Code of Civil Procedure, proceed to make such claimant also a party to the appeal.

Athiappa v. *Ayanna* 300

11. ——————, s. 43 520

12. ——————, s. 43—*Cause of action—Splitting a claim—Separate suits for rent due for successive years:*

Petitioners filed two suits in a Small Cause Court on the same day to recover rent due for two successive years under the same lease. The sum of the two claims exceeded the pecuniary limit of the Court's jurisdiction. The suit for the rent of the first year was dismissed under section 43 of the Code of Civil

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Procedure, on the ground that the claim ought to have been included in the suit for the second year's rent:—*Held* that, as the petitioners had no intention of abandoning either claim, the proper course was to allow them to withdraw both suits and file a fresh suit in a competent Court.

Alaju v. *Abdoola* 147

13. ——————————, s. 45—*Hindú Law—Suit for partition—Alienees made parties to suit*—Onus probandi:

Where a suit was brought by a Hindú for partition of family property against his father, brothers, and fifteen others to whom, it was alleged, the father had improperly alienated numerous parcels of the said property at different times:—*Held*, that the better course was for the Court to have ordered, under section 45 of the Code of Civil Procedure, separate trials to be held in respect of each alienation. In a suit brought by a Hindú to contest an alienation of family property made by his father, the onus of proving that the alienation is binding on the son lies upon those who claim the benefit of the alienation.

Subramanya v. *Sadasiva* 75

14. ——————————, s. 57—*Suit filed in wrong Court—Return of plaint:*

In a suit filed in a District Munsif's Court to recover certain land, the defendants alleged that the value of the land was understated by the plaintiff and exceeded by far the pecuniary limit of the Court's jurisdiction. Upon enquiry the Múnsif found this allegation to be true and directed the plaint to be returned to the plaintiff for presentation in a superior Court. The plaint having been presented in the Subordinate Court, the Subordinate Judge, on the authority of *Jagjivan Jáverdhás Seth* v. *Magdum Ali* (I.L.R., 7 Bom., 487), dismissed the suit:—*Held*, that the procedure adopted by the Múnsif was correct.

Kandu v. *Konda* 62

15. ——————————, ss. 59, 63, 138, 139—*Appeal—Rejection of documents admitted by Lower Court:*

Certain documents having been allowed by the District Múnsif to be filed by the plaintiff during the trial of a suit, the District Judge, on appeal, held that he was bound to strike them off the file on the ground that they were not filed with the plaint nor entered in any list annexed to the plaint, and because the Múnsif had not recorded any reason for admitting them:—*Held*, that, as the documents had been admitted in evidence by the Lower Court, the Appellate Court was bound to consider them.

Mínakshi v. *Velu* 373

16. ——————————, s. 223:

See SMALL CAUSE COURT, 2.

17. ——————————, ss. 224, 331, 332—*Decree on compromise—Execution against party to suit, not party to compromise—Resistance to execution—Procedure:*

In a suit for partition a compromise was entered into by all the parties except S, and a decree obtained on the terms thereof. In execution S was dispossessed and presented a petition to the Court, objecting that the decree was not binding on her. The petition was rejected:—*Held*, that the objection raised by S ought to have been investigated under section 244 of the Code of Civil Procedure, and that S was entitled to appeal against the order rejecting the petition.

Sankaravadivammál v. *Kumarasámya* 473

18. ——————————, s. 232—*Purchase of decree by creditor of one of several judgment-debtors—Probability of decree being executed against another judgment-debtor no ground for refusing execution to purchaser:*

A decree for damages and costs having been obtained against P and C, A, to whom P was indebted and was about to assign property as security, in order to prevent P being adjudicated an insolvent, and with a view to execute the decree against C if possible, purchased the decree. A applied,

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under section 232 of the Code of Civil Procedure, for leave to execute the decree. This application was rejected by Kernan, J., on the ground that the decree was certain to be executed against C and not against P, under whose orders and for whose benefit C acted when he infringed the right of, and became liable in damages to, the plaintiff in the suit:—*Held*, on appeal, that the benefit likely to be gained by P by this transaction was no sufficient ground for refusing leave to A to execute the decree.

Agra Bank v. *Cripps* 455

19. ——————————, ss. 244, 583, 622—*Claim for rateable distribution by creditor rejected—Sum detained in Court, pending application to High Court—Application rejected—Interest on sum detained claimed in execution—Procedure:*

In execution of a decree by R, S, another creditor, claimed a rateable share of the proceeds realised. His claim was rejected. Pending an application to the High Court under section 622 of the Code of Civil Procedure to set aside this order, the share claimed by S was detained in Court at his request. The High Court rejected the application of S, and R took out execution for the costs incurred therein and for interest on the sum detained in Court at the request of S:—*Held*, that the interest could not be awarded to R in execution of the decree for costs.

Sanjivi v. *Rámasámi* 494

20. ——————————, s. 258—*Contract to certify satisfaction of decree—Breach—Suit for damages:*

The provision in section 258 of the Code of Civil Procedure, 1882, which forbids any Court to recognise a payment under, or an adjustment of, a decree, unless certified to the Court executing the decree, does not debar a suit for damages for a breach of a contract to certify.

Mallamma v. *Venkappa* 277

21. ——————————, s. 276:

See INSOLVENCY ACT.

22. ——————————, ss. 276, 295 573

23. ——————————, ss. 313, 315—*Refund of purchase-money—Limitation Act, sch. II, art.* 174:

Under section 313 of the Code of Civil Procedure a purchaser at a sale in execution of a decree may resist the confirmation of the sale and prevent its conclusion, while under section 315 he may apply, after the confirmation of the sale, for refund of the purchase-money on the ground that nothing passed by the sale. To entitle a purchaser, under para. 2 of section 315 of the Code of Civil Procedure, to a refund of purchase-money, it is not necessary that a Court should have decided in other proceedings that the judgment-debtor had no saleable interest in the property which purported to be sold, or that the purchaser should have obtained actual possession and have been deprived thereof.

Sivarámá v. *Rámá* 99

24. ——————————, s. 315—*Refund of purchase-money:*

Upon an application for refund of purchase-money under section 315 of the Code of Civil Procedure, the Múnsif being of opinion that the purchaser had in collusion with the judgment-debtor run up the price of the land at auction far beyond its value with a view to prevent other property attached from being sold to satisfy the decree, rejected the application, except as to a sum of Rs. 50, which represented the alleged value of the judgment-debtor's interest in the land brought to sale by the decree-holder:—*Held*, that, as the judgment-debtor was found to have no interest in the land, the purchaser was entitled to a refund of the money paid to the decree-holder.

Kunhi Moidin v. *Tarayil Moidin* 101

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25. ————————, s. 317—*Benámi purchaser—Stranger to the transaction not affected:*

In a suit by A against B and C to recover land, A alleged that B bought the land at a Court-sale on his behalf. B did not contest the suit. C, who did not claim under B, pleaded that A could not recover by reason of the provisions of section 317 of the Code of Civil Procedure:—*Held*, that section 317 only enabled the certified purchaser and those claiming under him to avoid arrangements made with him in the nature of a trust, and was no bar to the suit.

Rámakrishnappa v. *Ádináráyana* 511

26. ————————, s. 331—*Civil Courts Act, Madras*, 1873, *s.* 12—*Jurisdiction—Claim below ordinary pecuniary limit:*

A Court executing a decree obtains, by virtue of section 331 of the Code of Civil Procedure, a special jurisdiction which enables it to try a claim, of which the value of the subject-matter falls below the pecuniary limit of its ordinary jurisdiction. By virtue of section 647 of the Code of Civil Procedure, a superior Court may, for sufficient cause, transfer a claim, registered under section 331, to a Subordinate Court for trial.

Sithalakshmi v. *Vythilinga* 548

27. ————————, s. 332—*Limitation Act, sch. II, arts.* 11, 13:

Where an application was made under section 332 of the Code of Civil Procedure for possession of property and rejected, and the applicant brought a suit to recover the property more than one year subsequent to the order rejecting the application:—*Held*, that the suit was not barred either by article 11 or article 13 of schedule II of the Indian Limitation Act, 1877.

Ayyasámi v. *Samiya* 82

28. ————————, ss. 336, 341, 344, 349—*Judgment-debtor—Imprisonment—Discharge:*

Sections 336 and 349 of the Code of Civil Procedure, 1882, are applicable to judgment-debtors under arrest, but not committed to jail. A judgment-debtor committed to jail can only be discharged under section 341.

In re *Quarme* 603

29. ————————, ss. 336, 344, 638—*Discharge of judgment-debtor arrested under decree of High Court:*

A judgment-debtor having been arrested in execution of a decree of the High Court in its Original Civil Jurisdiction and brought before the Court under the provisions of section 336 of the Code of Civil Procedure, claimed to be discharged on the ground that he intended to apply to the Court to be declared an insolvent either under the provisions of ch. XX of the Code or of 11 & 12 Vict., c. 21:—*Held*, that the judgment-debtor on expressing his intention to file a petition and schedule under 11 & 12 Vict., c. 21, and complying with the conditions of section 336 of the Code of Civil Procedure was entitled to be discharged.

Ex parte *Pinsent* 276

30. ————————, s. 341—*Decree—Execution—Arrest—Non-payment of subsistence-money—Discharge—Re-arrest:*

The discharge of a judgment-debtor before imprisonment on account of the non-payment of the subsistence-money for the debtor is no bar to the debtor being re-arrested.

Subba v. *Venkata* 21

31. ————————, s. 375—*Compromise of suit—Consent withdrawn before decree:*

By an agreement made in writing before the hearing, the parties to a suit entered into a compromise by which the plaintiff agreed for consideration to withdraw the suit. When the case came on for hearing, plaintiff refused to fulfil his promise. The defendant having produced the agreement, the Múnsif held that it must be enforced, and dismissed the suit. On appeal, the

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District Judge held that the agreement could not be treated as a compromise as the plaintiff did not consent, and remanded the suit:—*Held*, that the agreement could be enforced. *Buttonsey Lálji* v. *Pooribái* (I.L.R., 7 Bom., 304) approved.

Karuppan v. *Rámásámi* 482

32. ——————, ss. 483, 484, 648—*Attachment before judgment—Property not in jurisdiction :*

Under the provisions of sections 483 and 484 of the Code of Civil Procedure, 1882, property of the defendant, which is not within the jurisdiction of the Court, cannot be attached before judgment.

Krishnasámi v. *Engel* 20

33. ——————, s. 503—*Powers of receiver :*

In 1879 a zamíndár granted a lease of part of the zamíndári for twenty years, reserving a rent of 18,000 rupees per annum. In 1881, the zamíndári having been attached by a creditor, the zamíndár granted a new lease in perpetuity in lieu of the former lease, reserving a rent of Rs. 12,000 a year. A receiver of the zamíndári having subsequently been appointed with full powers under the provisions of section 503 of the Code of Civil Procedure, sued the lessee to recover rent at the rate reserved in the first lease from 1881:—*Held*, that the receiver was entitled to recover the rent claimed. The provisions of section 503 of the Code of Civil Procedure were intended to declare that the receiver, in respect of all property which was or could be attached, had the powers of the owner as they existed at the time the property was brought under the orders of the Court by attachment, provided that they have not ceased by operation of law.

Gopálasámi v. *Sankara* 418

34. ——————, s. 503—*Receiver, Appointment of, after decree—Limitation Act, s. 15—Injunction :*

In a suit brought in 1880 by the widow of a deceased partner, to wind up a partnership, the surviving partner was prohibited by the Court, at the instance of the plaintiff, from collecting debts due to the firm; but leave was given to apply for the recovery of debts which might become barred by limitation. After decree, on the application of the plaintiff, a receiver was appointed under section 503 of the Code of Civil Procedure to collect outstanding debts for the purpose of executing the decree. The receiver having sued in 1883 to recover a debt which was due to the firm in 1879, the suit was dismissed (1) on the ground that the appointment of a receiver after decree was *ultrá vires*; (2) because the debt was barred by limitation:—*Held*, (1) that the appointment of the receiver was valid, (2) that under section 15 of the Limitation Act the suit was not barred.

Shunmugam v. *Moidin* 229

35. ——————, ss. 544, 622—*Appeal against appellate decree by party to suit who did not appeal against original decree :*

S having mortgaged land to K as security for a debt, sold it to V, who undertook to pay the debt. K alleging that C had undertaken either to make V pay the debt or to execute a mortgage of his own land to secure its repayment, and that V had dispossessed him, sued S, V and C to recover the debt by sale of the land mortgaged, mesne profits from V, and costs from S, V and C. The District Múnsif decreed payment against S; mesne profits, and, in default of payment by S, a sale of the land against V; and costs against S, V and C. V and C appealed against this decree. The Subordinate Judge found that the debt had been paid and held that, even if the debt had not been paid, K had no cause of action against V or S, but, if at all, against C, and dismissed the suit as against V. The Subordinate Judge also held that he had no jurisdiction to interfere with the decree against S, and saw no reason to interfere with the decree against C. S appealed against this decree:—*Held*, that even if S was not entitled to appeal in order to have the decree against him set aside, the error of the Subordinate Judge could be corrected under section 622 of the Code of Civil Procedure by a direction to exercise the discretionary power given by section 544 of the said Code.

Seshadri v. *Krishnan* 192

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36. ——————————, s. 581—*Objections to decree* in formâ pauperis 214

37. ——————————, s. 592—*Pauper appeal—Application by party, not by pleader, necessary*:

An application for leave to appeal *in formâ pauperis*, under section 592 of the Code of Civil Procedure, must be made by the party in person, subject to the exemption contained in section 404 of the Code of Civil Procedure.

In re *Narisi* 504

38. ——————————, ss. 623, 624—*Review of judgment—Abolition of Court—Business transferred to another Court*:

Section 624 of the Code of Civil Procedure must be read as a proviso to section 623:—*Held*, therefore, that, when a Court had been abolished and its business transferred to a Court presided over by another Judge, such Judge should not entertain an application for review of judgment except in the case provided for by section 624.

Sarangapani v. *Náráyanasámi* 567

39. ——————————, s. 648—*Residence—Arrest before judgment*:

Where an officer proceeding from Burmah to England on leave resided a few days in Madras on the way:—*Held*, that such residence was sufficient, for the purpose of section 648 of the Code of Civil Procedure, to render him liable to arrest before judgment.

Boeret v. *Frere* 205

COERCION—*Suit by Hindû widow to set aside release*:

See HINDÛ LAW, 20.

COMPROMISE OF SUIT:

See CIVIL PROCEDURE CODE, 31.

CONDITION PRECEDENT:

See CONTRACT, 1.

CONTRACT—*Executory sale—Delivery order—Appropriation of goods to contract—Substitution of liability—Condition precedent—Delivery in certain months—Payment in advance—Refusal to deliver—Damages*:

In January 1883 W. & Co. of Madras contracted to deliver to P. & Co. of Madras certain goods of a certain quality, subject to survey before shipment, at a certain price "f.o.b. Cocanada, delivery in April and May; terms, full advance and local exchange ¼ per cent. payable at Madras." This contract was contained in bought and sold notes. It was further agreed that the goods were to be delivered on board any ship P. & Co. might direct at the port of Cocanada. P. & Co. paid the full amount of the purchase money in January. On the 31st March P. & Co. wrote to W. & Co. requesting that the goods might be marked in a certain way. On the 18th May W. & Co. wrote to P. & Co., enclosing a letter from W. & Co. to S. N. & Co. of Cocanada requesting S. N. & Co. to hold the goods (which were said to have been purchased by W & Co. from S. N. & Co. and to be in godown) at the disposal of P. & Co. In the letter to P. & Co. from W. & Co. the goods were also said to be in godown at that date. On the same day P. & Co. wrote to S. N. & Co. enclosing a delivery order for the goods (which P. & Co. stated they believed to be in godown), requesting that they might be marked in a particular way. On the 25th May S. N. & Co. wrote to P. & Co. informing them that they held the goods at P. & Co.'s disposal. On the 28th May P. and Co. received this letter. On the 31st May P. & Co. chartered a ship to take on board the said goods and other goods bought by P. & Co. from S. N. & Co. and others, and wrote to S. N. & Co. informing them that the ship would arrive about the 12th June. On the 5th June P. & Co. wrote to S. N. & Co. acknowledging receipt of a letter which stated that only a portion of the goods to be shipped was ready. On the 9th June P. & Co. received a letter from S. N. & Co. stating that all the goods were ready. On the 17th June the ship arrived at Cocanada. On the 21st June S. N. & Co. stopped payment and ceased to carry on business. No goods were delivered according to the contract. S. N. & Co. never had the goods to deliver between 18th

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May and 17th June. In a suit by P. & Co. to recover from W. & Co. the price paid and damages for breach of contract to deliver the goods, it was contended for W. & Co.

I.—That the transfer of the delivery order of the 18th May amounted to a delivery of the goods:—*Held*, that as S. N. & Co. had neither had possession of the goods to be delivered nor had appropriated any goods to the contract, the delivery order was inoperative.

II.—That the acceptance of the delivery order by P. & Co. amounted to an agreement that S. N. & Co. should deliver to P. & Co. the goods when ready, and that the liability of S. N. & Co. was substituted for that of W. & Co:—*Held*, that such an agreement could not be inferred.

III.—That as S. N. & Co. by accepting the delivery order were estopped from denying that they had possession of the goods as against P. & Co., S. N. & Co. were discharged as against W. & Co., and therefore P. & Co. had no remedy against W. & Co:—*Held*, (1) that S. N. & Co. were not discharged as against W. & Co., as S. N. & Co.'s representations were false; (2) that even if S. N. & Co. were discharged, this could not affect P. & Co.

IV.—That as P. & Co. had not supplied a ship in May, they had failed to perform their part of the contract and could not recover:—*Held*, distinguishing *Bowes* v. *Shand* (L.R., 2 App. Ca., 455) and *Reuter* v. *Sala* (L.R., 4 C.P.D., 239), that the presence of the ship in May was not a condition precedent to P. & Co. recovering.

V.—That W. & Co. had rescinded the contract on the 29th June by refusing to deliver, and therefore P. & Co. were only entitled to recover the price paid:—*Held*, that W. & Co. were not entitled to rescind the contract:—*Held*, also that P. & Co. having paid in advance, were entitled to a reasonable time after the 29th June to prepare to purchase other goods, and were entitled to the difference between the contract price and the market price on the 1st of July as damages for the breach to deliver.

Shaw v. *Bill* 33

2. ———— *Family compact*:

See Aliyasantána Law.

3. ———— *Implied*:

See Small Cause Court, 1.

COSTS—*Privy Council Record—Irrelevant matter* 219

COURT FEES ACT, s. 7, cls. II, IV—*Claims for future emoluments attached to an office—Jurisdiction—Valuation—Madras Civil Courts Act*, 1873, *s.* 12—*Portion of a claim struck out and plaint returned for presentation to inferior Court*:

In a suit filed in the Court of a Subordinate Judge, the plaintiff prayed, *inter alia*, for a decree for the payment, annually, of the emoluments attached to a certain office, or their value at a rate stated in the plaint. This portion of the claim he valued, under clause ii of section 7 of the Court Fees Act, at ten times the amount of the value claimed for one year. The value of the claim thus stated exceeded the pecuniary limit of the jurisdiction of the District Múnsif. The Subordinate Judge held that this portion of the claim was not actionable, inasmuch as the right to the emoluments was conditional upon services to be rendered, and did not fall under clause ii of section 7 of the Court Fees Act, not being a fixed sum payable periodically, and therefore he held that the plaint was improperly valued, that the suit was not within his jurisdiction, and that the plaint should be returned to be presented to the proper Court:—*Held*, that this order was right.

Krishnan v. *Ravi Varma* 384

2. ———— sch. II, art. 1 (*b*):

See Stamp Act, 2.

3. ———— sch. II, art. 11 (*a*); art. 17, cl. VI. 22

CRIMINAL PROCEDURE CODE, ss. 17, 435, 437—*District Magistrate—Power to revise proceedings of Sub-Divisional Magistrate of the first class—"Inferior," "Subordinate" Magistrates—Reason of distinction*:

Under Section 435 of the Code of Criminal Procedure, a District Magistrate has power to call for, and examine, the record of a proceeding before a Sub-

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Divisional Magistrate of the first class. *Nobin Kristo Mookerjee* v. *Russick Lall Laha* (I.L.R., 10 Cal., 268) dissented from.

In re *Padmanabha* 18

2. ———————, ss. 403, 437—*Different charges arising out of same transaction—Acquittal—Further inquiry—Re-trial:*

E being charged with theft and mischief, in respect of certain branches cut from a tree claimed by the complainant, was tried by a Subordinate Magistrate on the charge of mischief and acquitted on the ground that, as against the complainant, E had title to the tree. On the application of the complainant, the District Magistrate directed further inquiry into the case under section 437 of the Code of Criminal Procedure, and on a reference to the Court of Session, the Sessions Judge held that, as no inquiry into the charge of theft had been held, the order was legal:—*Held*, that the District Magistrate had no power to pass such an order under section 437, and that a trial on the charge of theft was barred by virtue of section 403 of the Code of Criminal Procedure.

Queen-Empress v. *Erramreddi* 296

3. ———————, s. 437—*Further inquiry—Re-trial—District Magistrate, Powers of:*

Where an accused person has been discharged by a Magistrate, further inquiry cannot be directed, under section 437 of the Code of Criminal Procedure, on the ground that the Magistrate has not rightly appreciated the credit due to the witnesses. Further inquiry should only be directed when other witnesses might have been examined, or when the witnesses have not been properly examined; and inasmuch as section 437 does not direct that the evidence already taken should be taken again, the further inquiry should ordinarily be made by the Magistrate who made the original inquiry. Where a District Magistrate being of opinion that a Subordinate Magistrate had, without just cause, refused credit to the witnesses in a certain case and had improperly discharged an accused person, directed a further inquiry by another Magistrate, and the accused was on the same evidence re-tried and convicted:—*Held*, that the conviction must be quashed.

Queen-Empress v. *Amir Khan* 336

4. ———————, s. 488—*Maintenance—Imprisonment for default of payment—Subsequent offer to pay—Sentence absolute:*

A sentence of imprisonment awarded under section 488 of the Code of Criminal Procedure for wilful neglect to comply with an order to pay maintenance is absolute and the defaulter is not entitled to release upon payment of the arrears due.

Biyacha v. *Moidin Kutti* 70

CUSTOM—*Practice—Labis—Ravuthans of Palgát—Muhammadan religion—Hindú law of inheritance—Exclusion of widow and daughters by sons—Evidence necessary to support valid custom:*

A claim by the widow of S. Ravuthan, a Labi of Palgát, and her daughters for their shares of his estate under Muhammadan law was opposed by other members of the family, who pleaded that, according to a special custom obtaining among the Ravuthans of that part of the country adopted from Hindú law, females are excluded from inheritance if sons or sons' sons exist. In two instances it was proved that woman of this class had obtained shares under Muhammadan law by suits without this plea having been put forward. The District Múnsif described these cases as interruptions and found on the evidence that the custom was proved. On appeal this decree was confirmed by the Subordinate Judge:—*Held*, that no valid custom was established by the evidence. A custom to be valid must be consciously accepted as having the force of law.

Mirabivi v. *Vellayanna* 464

DAMAGES:

See CONTRACT.

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2. ——— SPECIAL, MEASURE OF, IN ACTION FOR SLANDER:

See DEFAMATION.

DECREE—*Breach of contract to certify satisfaction:*

See CIVIL PROCEDURE CODE, 20.

2. ——— *Execution against Hindú family:*

See HINDÚ LAW, 2, 9, 10.

3. ——— *Execution—Ascertainment of improvements* 381

4. ——— *Execution—Limitation—Decree for possession upon payment of mortgage amount and value of improvements—Final decree on ascertaining value of improvements:*

In a decree for redemption of a Malabar kánam (mortgage), it was ordered on the 12th December 1879 that the defendants should put the plaintiff in possession of the land upon payment by plaintiff to defendant No. 1 of the mortgage amount, and of the value of improvements, to be determined in execution, to such of the defendants as should be found entitled. On the 12th August 1880 the plaintiff applied for execution, and on the 23rd September 1881 an order was passed that execution should issue on payment into Court by the plaintiff of the mortgage amount and the value of improvements which had then been ascertained. The plaintiff having failed to deposit the said amount, the application for execution was struck off the file on the 10th November 1881. On the 8th December 1883 the plaintiff applied again for execution, and objection was taken that the application was barred by limitation:—*Held*, that the application was not barred by limitation. *Dildar Hossein* v. *Mujeedunnissa* (I.L.R., 4 Cal., 629), approved.

Krishnan v. *Nílakandan* 137

5. ——— *Execution—Sale:*

See MALABAR LAW, 4.

6. ——— *Personal—Attachment of joint property:*

See HINDÚ LAW, 2.

DEFAMATION—*Slander—Action for abuse, no special damage being alleged—Damages, Measure of:*

The rule of English Law which prohibits, except in certain cases, an action for damages for oral defamation unless special damage is alleged, being founded on no reasonable basis, should not be adopted by the Courts of British India. If defamatory expressions are used under such circumstances as to induce in the plaintiff reasonable apprehension that his reputation has been injured, and to inflict on him pain consequent on such belief, the plaintiff is entitled to recover damages without actual proof of loss sustained. *Semble*:—An action will not lie for vulgar abuse or hasty expressions; but for malicious or culpable oral defamation an action will lie. Vindictive damages should not be awarded, and a distinction should be drawn in awarding damages when the defendant acts from carelessness and when he acts maliciously. In the latter case the plaintiff is entitled to full compensation for the pain suffered, and in the former to a sum sufficient to establish his innocence of the charges made.

Parvathi v. *Mannár* 175

DEGRADATION:

See HINDÚ LAW, 8.

DISTRICT MAGISTRATE—*Powers of:*

See CRIMINAL PROCEDURE CODE, 1, 3.

DIVORCE:

See HINDÚ LAW, 8.

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EMOLUMENTS OF OFFICE:

See HEREDITARY VILLAGE OFFICE.

ENFRANCHISEMENT—*Karnam's inam:*

See HEREDITARY VILLAGE OFFICE.

ESTOPPEL:

See CIVIL PROCEDURE CODE, 1, 2, 3, 4, 6, 7, 8.

2. ———— *By conduct:*

See TRADE-MARK 149

FISHERY—*Tidal river—Prescription:*

The right of the public to fish in tidal waters in British India may be curtailed by an exclusive privilege acquired by grant or prescription by certain persons within certain limits. Such an exclusive privilege being an infringement of the general rights of the public, could be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown.

Viresa v. *Tatayya* 467

FOREST ACT, s. 10—*Appeal to the District Court—Court Fees Act, sch. II, art. 11 (a), art. 17, cl. vi.:*

An appeal to the District Court from the rejection of a claim by a Forest Settlement officer under clause ii of Section 10 of the Madras Forest Act, 1882, falls under article 17, clause vi, and not under article 11 (a) of schedule II of the Court Fees Act, 1870.

Kamarájá v. *Secretary of State for India* 22

FRAUD—*Suit by Hindú widow to set aside release:*

See HINDÚ LAW, 20.

GENERAL CLAUSES ACT, 1868, s. 5 350

GOVERNOR IN COUNCIL, COMPLAINT AGAINST:

See JURISDICTION, 3.

HEREDITARY VILLAGE OFFICE—*Regulation VI of* 1831—*Act IV of* 1866 (*Madras*)—*Karnams inám land—Hereditary office—Enfranchisement—Inám Commissioner's title-deed—Title to emoluments of office:*

The lands forming the emoluments of an hereditary village office having been separated from the office by Government, were enfranchised and granted by the Inám Commissioner to V, who had been appointed to, and, at the date of enfranchisement, held the office without possessing any hereditary claim thereto. In a suit by R, who claimed to be of the family of the hereditary office-holders, to recover the land from V:—*Held*, by the Full Bench (Hutchins, J., dissenting) that R could not recover.

Venkata v. *Rámá* 249

HINDU LAW—*Adoption—Authority—Consent of sapinda:*

V, one of the nearest male sapindas of S, gave his son in adoption to the widow of S in 1878. Both the giver and receiver professed to have been carrying out the directions of S. In 1883 a suit was brought by N, another sapinda, to set aside this adoption, and it was found that S had not authorized the adoption as alleged by the defendants:—*Held*, that, under the circumstances, V's assent to the adoption did not render it valid.

Venkatalakshmamma v. *Narasayya* 545

2. ———— *Debt binding on family—Suit against one of two undivided brothers—Personal decree—Attachment of family property—Effect of decree:*

The creditor of a joint Hindú family, consisting of two brothers, sued the elder brother only (the younger being a minor) to recover a debt binding on both brothers, and having obtained a decree for the payment of the debt,

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attached the family property. In a suit by the younger brother to set aside the attachment *quoad* his share in the property attached :—*Held*, that, inasmuch as the decree was not passed against the elder brother as manager of the family, the younger brother's suit must prevail. *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Sing* (L.R., 6 I.A., 233) distinguished.

Virarágavamma v. *Samudrala* 208

3. ——— *Inheritance—Stepmother—Paternal uncle :*

Under the Hindú law which obtains in the presidency of Madras, a stepmother does not succeed to the estate of her stepson in preference to a paternal uncle. *Kumaravelu* v. *Virana Goundan* (I.L.R., 5 Mad., 29) and *Muttammál* v. *Vengalakshmi Ammál* (I.L.R., 5 Mad., 32) approved.

Mari v. *Chinnammál* 107

4. ——— *Inheritance—Stepmother—Sagótra Sapindas :*

According to Hindú law current in the Madras Presidency, a stepmother does not succeed to the estate of her stepson in preference to his grandfather's brother's grandson.

Rámasámi v. *Nárásamma* 133

5. ——— *Inheritance—Unborn son—Right to ancestral property not defeated by will of father :*

According to the Hindú law which obtains in the Madras Presidency, the right of a son in the womb to ancestral property cannot be defeated by a will or gift. *Quære* :—Whether this rule would govern the case of an alienation for value.

Minákshi v. *Virappa* 89

6. ——— *Lingáits—Marriage—Desertion of wife—Re-marriage of wife valid :*

According to custom obtaining among the Lingáits of South Canara, the re-marriage of a wife deserted by her husband is valid.

Virasangappa v. *Rudrappa* 440

7. ——— *Maintenance—Suit to reduce rate awarded by decree :*

S, a Hindú, obtained a decree for maintenance at a certain rate against R, her father-in-law. After the death of R, V, who was adopted by R, subsequent to the decree, sued S to have the rate reduced on the ground that the estate of R, which came to his hands, was considerably diminished in value :—*Held*, that, as the estate had been diminished by the voluntary acts of R and V, the claim could not be allowed.

Vijaya v. *Sripathi* 94

8. ——— *Marriage—Divorce—Change of religion—Degradation—Death of husband while outcast—Dissolution of marriage—Suit by widow to recover husband's estate :*

In 1860 K married S, both being Brahmans. K subsequently became a convert to Christianity. In 1881 K died and S claimed his estate :—*Held*, that, according to Hindú Law, K died an outcast and degraded, and that, as his degradation was unatoned for, the marriage became absolutely dissolved, and no right of inheritance remained to S.

Sinammál v. *The Administrator-General of Madras* 169

9. ——— *Money decree against father—Attachment of sons' shares :*

In a suit brought against the father of a Hindú family and his eldest son, on a bond executed by the former, by which family property was hypothecated as security for the repayment of the debt, decree was passed against the father only and his share of the property was declared liable to be sold. In execution of this decree, family property was attached, but, on the intervention of the younger sons, the attachment was set aside as to their shares. In a suit brought by the decree-holder to establish his right to sell the younger sons' shares in satisfaction of the decree against their father :—*Held*, that so far as the younger sons were concerned the decree must be

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treated as a decree for money against the father and that all that could be sold in execution of the decree against the father was the share of the father.

Umamahésvara v. *Singaperumál* 376

10. ———— *Mortgage by father—Suit to enforce against manager of family—Decree for sale—Attachment—Order for sale of property—Sale of right, title, and interest—Rights of purchaser:*

V, a Hindú, and his son P executed a mortgage of a house, the self-acquired property of V. V having died, P, the manager of the family, was sued by the mortgagee on his own promise in the mortgage-deed and as representative of V, and a decree was passed for the sale of the house in default of payment by P within three months of the debt then due. This period having elapsed, the mortgagee applied to the Court to enforce the decree by attachment of the mortgaged property, and the property having been attached, application was made for sale. By a warrant, dated 3rd December 1874, the Sheriff of Madras was ordered to sell the property, and on the 12th July 1875 the Sheriff sold the right, title, and interest of the judgment-debtor in the said house to K. In a suit brought by K against P and the other members of the family to recover possession of the house:—*Held*, that as the mortgagee intended to enforce his rights under the mortgage by sale, and the Court intended to sell the house as mortgaged property, K was entitled, by virtue of his purchase, to recover possession of the house—*Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (6 I.A., 233) referred to and followed.

Krishnama v. *Perumál* 388

11. ———— *Parent and child—Duty of son to maintain aged mother:*

According to Hindú Law, a son is bound to support his aged mother, whether or not he has inherited property from his father.

Subbaráyana v. *Subbakká* 236

12. ———— *Partition suit—Alienees—Parties*—Onus probandi:

See Civil Procedure Code, 13.

13. ———— *Partition suit—Joint property—Stridhanam—Presumption—Procedure—Suit by grandson against uncle in lifetime of grandfather, alleged to be imbecile—Death of grandfather before trial—Objection to suit on appeal disallowed—Civil Procedure Code, s. 561—Objections to decree* in formâ pauperis *disallowed:*

K sued N (his uncle) for partition of the estate of V, the (father of N), in the lifetime of V, who was alleged to be of unsound mind. N objected to the suit being entertained on the ground that V was alive. Before issues were settled V died and the suit was tried and K obtained decree. On appeal by N on the ground that, when the plaint was filed, K had no cause of action:—*Held*, that the decree could not on this ground be set aside. Objections by a respondent to a decree under section 561 of the Code of Civil Procedure cannot be filed *in formâ pauperis*, *Bábáji Hari* v. *Rájárám Ballál* (I.L.R., 1 Bom., 75) followed. When property stands in the name of a female member of a joint Hindú family there in no presumption that such property is the common property of the family.

Náráyana v. *Krishna* 214

14. ———— *Representation of estate by widow—Res judicata:*

See Civil Procedure Code, 8.

15. ———— *Sale by widow in excess of power—Suit by reversioners for share of land sold on payment of proportionate amount of sum properly lent—Decree for redemption:*

The widow of a Hindú sold to the defendants a portion of her husband's estate for less than its market value and for a sum in excess of what she was justified in raising by sale. The plaintiffs, two of three reversioners entitled to the estate, sued, on the death of the widow, to recover from the purchasers two-thirds of the land sold upon payment of two-thirds of the sum which the widow was justified in raising:—*Held*, that the plaintiffs were entitled to the relief claimed.

Subramanya v. *Ponnusámi* 92

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16. ——————' *Sudra—Illegitimate son—Issue of adulterous intercourse—Maintenance :*

A Sudra having kept the wife of another man in his house for many years as a concubine, had a son by her, whom he recognized as his own. In a suit brought by the son, who was of age, to recover maintenance from his putative father :—*Held*, that he was entitled to recover.

Kuppa v. *Singaravélu* 325

17. —————— *Sudras—Illegitimate son, status and rights of—Suit for partition by illegitimate son of undivided brother against sons of other brothers :*

In a joint Hindú family of the Sudra caste, consisting of three brothers, two left legitimate sons and the third an illegitimate son. In a suit brought by the latter for partition of the family estate against his father's brothers' sons :—*Held*, that he was not entitled to a share but only to maintenance.

Ranoji v. *Kandoji* 557

18. —————— *Widow—Alienation—Pious purposes—Spiritual necessities :*

Although pilgrimages and sacrifices performed by a Hindú widow may be indirectly beneficial to her deceased husband, they are not ceremonies indispensable for his spiritual benefit. A sale by a Hindú widow to raise money for pious acts, not in the nature of spiritual necessities, unless such sale is reasonable in the circumstances of the family and the property sold is but a small portion of the property inherited from her husband, is invalid.

Rámá v. *Ranga* 552

19. —————— *Widow's estates—Alienation—Movable property :*

The restriction placed by the Hindú law on a widow's power of alienation of her husband's estate extends to movable as well as immovable property.

Narasimha v. *Venkatadri* 290

20. —————— *Widow's estate—Alienation—Movables—Release by widow, suit to set aside—Duress—Coercion—Fraud—Grounds on which relief is granted :*

B.R., the widow of a zamíndár, having for valuable consideration released all her claims on her husband's estate in favor of V.S., her husband's brother, by a deed executed five days after the death of her husband, brought a suit against V.S. to set aside the deed of release on the ground that it was obtained by threats and fraud, and to recover the estate :—*Held*, that it was not sufficient to find that the consent given by the plaintiff was not caused by coercion, as defined in the Indian Contract Act, nor by duress as known to the English Law ; but that the questions to be decided were (1) whether undue advantage had been taken of the plaintiff's position ; (2) whether the plaintiff had been sufficiently informed as to her rights or had proper advisers ; (3) whether the contract was an unconscionable or "catching" bargain. A Hindú widow is not at liberty to defeat the rights of reversioners by alienating or wasting movable property inherited from her husband.

Buchi Rámáyya v. *Jagapathi* 304

21. —————— *Yajaman of Aliyasantána Family :*

See ALIYASANTÁNA LAW.

IMPLIED CONTRACT :

See RENT RECOVERY ACT, 8.

IMPROVEMENTS :

See MALABAR LAW, 3.

INAM COMMISSIONER'S TITLE-DEED :

See HEREDITARY VILLAGE OFFICE.

INSOLVENCY ACT, 11 & 12 Vict., c. 21, s. 7—*Vesting order—Civil Procedure Code, s. 276—Attachment before judgment—Official Assignee's title :*

Where a vesting order has been made under 11 & 12 Vict., c. 21, s. 7, after attachment and before decree, the title of the Official Assignee takes effect

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and prevents the attaching creditor from obtaining satisfaction of his decree by a sale—*Shib Kristo Shaha Chowdhry* v. *Miller* and *Gamble* v. *Bholágir* followed.

Sadayappa v. *Ponnama* 554

2. ———— s. 19—*Rule* 14 *of Insolvent Court—Official Assignee—Commission* :

The right of Official Assignee to commission under 11 & 12 Vict., c. 21, s. 19 does not arise until there are in his hands funds realised and available for distribution among the creditors. If at such time the adjudication is annulled the right to commission subsists.

Official Assignee v. *Ramalinga* 79

3. ———— ss. 47, 51 :

By an order made under the provisions of 11 & 12 Vict., c. 21, it was directed that an insolvent-debtor was entitled to his discharge as to all the debts mentioned in his schedule, save and except the debt due to a certain creditor and as to such debt that the insolvent should be entitled to be discharged as soon as he had been in custody at the suit of the creditor for six months, and it was further ordered that the insolvent be committed to custody in respect of this debt for six months :—*Held*, that the order of committal was within the power given to the Court by ss. 47 and 51 of 11 & 12 Vict., c. 21.

Nixon v. *Chartered Mercantile Bank* 97

4. ————*Jurisdiction* :

See CIVIL PROCEDURE CODE, 29.

INTENTION—*Attempt* :

See PENAL CODE, 3.

INTIMIDATION :

See PENAL CODE, 1.

JURISDICTION :

See CIVIL COURTS ACT (MADRAS), s. 12.

2. ————

See CIVIL PROCEDURE CODE, 26.

3. ————*Complaint against Governor and Council of Madras*—21 *Geo. III, c.* 70, s. 5 ; 39 & 40 *Geo. III, c.* 79, *s.* 3 ; 4 *Geo. IV, c.* 71, *s.* 17 :

Section 3 of 39 & 40 Geo. c. 70, which provides that the Governor and Council at Madras shall enjoy the same exemption and no other from the authority of the Supreme Court at Madras as is enjoyed by the Governor-General and Council from the jurisdiction of the Supreme Court at Calcutta, did not confer on the Supreme Court at Madras a jurisdiction over the Governor and Council of Madras similar to that conferred by 21 Geo. III, c. 21, s. 5, on the Supreme Court at Calcutta over the Governor-General and Council.

In re *Wallace* 24

4. ———— *Suit to eject trustee—Valuation—Specific Relief Act, s.* 42 :

By an agreement between S and M, members of the same Hindú family, it was arranged that certain immovable property dedicated to charitable uses by the family should be managed by M, subject to the supervision of S, and that M should render accounts to S and observe certain other conditions. S sued M in the Court of the District Múnsif and prayed for a decree for the removal of M as manager and for the appointing of himself as manager of the property. M objected that the Court had no jurisdiction, because the property exceeded in value the pecuniary limits of the jurisdiction of the District Múnsif's Court as fixed by section 12 of the Madras Civil Courts Act, 1873 :—*Held*, that S was not entitled to sue for the removal of M without

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praying for his ejectment from the property, and that, as the property exceeded in value Rs. 2,500, the District Múnsif had no jurisdiction.

Sonáchala v. *Manika* 516

KARNAM'S INAM:

See HEREDITARY VILLAGE OFFICE.

LABIS—*Ravuthans:*

See CUSTOM.

LANDLORD AND TENANT—*Service tenure—Resumption—Notice:*

Where land held on service tenure is resumable at the will of the grantor, the holder cannot be ejected before a reasonable notice to surrender the land has been given.

Lakshmi v. *Chendri* 72

2. —————— *Tenant on sufferance—Limitation Act*, 1877, *sch. II, arts.* 139, 140:

Although the English rule of law as to the nature of the possession of a tenant for a term of years, who holds over, has been adopted in British India, the rule of limitation prescribed by 3 & 4 Will. IV, c. 27, by which time begins to run against the landlord from the date of his right of entry, has not been adopted in the Indian Limitation Act, 1877. If a tenant for years holds over in British India, time does not begin to run against the landlord until the tenancy on sufferance has been determined.

Adimulam v. *Pír Ravuthan* 424

2. ——————

See RENT RECOVERY, ACT.

LIMITATION:

See RENT RECOVERY ACT, 4.

See Decree, 4 137

LIMITATION ACT, 1871:

See CIVIL PROCEDURE CODE, 2.

2. —————— **1877, s. 10**—*Allegation of holding in trust:*

By Act XV of 1877, section 10, where property has become vested in a person in trust for a specific purpose, a suit to follow such property in his hands is not barred by lapse of time. Acting under Regulation V of 1804, the Court of Wards took charge of an impartible zamíndárí, on the death of the zamíndár leaving minor sons, of whom the eldest was afterwards recognized as heir and received possession on attaining full age. Upon a subsequent adjudication of forfeiture against him under Regulation VII of 1808, the Government obtained possession of the zamíndárí:—*Held*, that the Government was not placed in the position of a person in whom property had become vested for a specific purpose, and that the above section was not applicable to prevent the operation of the law of limitation under XV of 1877, which barred the suit brought by another of the sons, alleging title to the zamíndárí.

Visiarámarázu v. *The Secretary of State for India in Council* 525

3. ——————, **s. 15:**

See CIVIL PROCEDURE CODE, 34.

4. ——————, **sch. II, arts. 11, 13** 134

5. ——————

See CIVIL PROCEDURE CODE, 27.

6. ——————, **sch. II, arts. 139, 140:**

See LANDLORD AND TENANT, 2.

7. ——————, **sch. II, art. 174** 99

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3. ———————————, sch. II, art. 178.—*Application for Certificate to collect debts of deceased person:*

Article 178 of schedule II of the Indian Limitation Act, 1877, does not affect an application under Act XXVII of 1860 for a certificate to collect debts due to the estate of a deceased person.

Janaki v. *Kesavulu* 207

LINGAITS—*Marriage:*

See HINDÚ LAW, 6.

MAINTENANCE:

See CRIMINAL PROCEDURE CODE, 4.

See HINDÚ LAW, 7, 16.

MALABAR LAW—*Inheritance—Issue of parents governed by different systems of law:*

Where a woman belonging to a Malabar tarwad governed by the Marumakatayam law (succession by nephews) has issue by a man who is governed by the Makatayam law (succession by sons), such issue are *primâ facie* entitled to their father's property in accordance with the Makatayam law and to the property of their mother's tarwad in accordance with the Marumakatayam law.

Chathunni v. *Sankaran* 238

2. ———————*Kánam tenure—Improvements—Trees of spontaneous growth—Redemption suit—Costs of ascertaining value of improvements:*

According to Malabar custom, kánams (mortgages) must, on the expiry of the term, either be discharged or renewed. On redemption of a kánam, the kánam-holder (mortgagee) is not entitled to claim under the head of improvements the value of trees of spontaneous growth. In suits to redeem land demised on kánam tenure, on payment of the value of improvements, the costs of the adjudication necessitated by the refusal of either party to accept the terms of compensation offered or demanded by his opponent should, when those terms are reasonable, be charged on the party refusing.

Náráyana v. *Náráyana* 234

3. ———————*Kánam tenure—Redemption on terms of admitted demise—Improvements—Local custom—Jenmis right to a moiety—Arrears of rent—Jenmis right to deduct from amount payable by him:*

In a suit brought against A and B for redemption of land alleged to have been demised to A on kánam tenure in 1874, and to be held by B under A, it was found that the demise of 1874 was invalid because it had been executed fraudulently, but inasmuch as B admitted that he was in possession under a similar demise of 1855 it was *held* that the plaintiff was entitled to redeem on the terms of the demise admitted by B. *Kunhi Kutti Nair* v. *Kutti Maracoar* (4 M.H.C.R., 359) followed. Local usage of Ernád, by which the jenmi on redemption of a kánam takes credit for one-half of the value of improvements effected by the kánamdar, upheld. The right of a jenmi to deduct arrears of rent from the amount payable by him on redemption of a kánam, being a customary incident of the tenure, is not affected by the three years' period of limitation for recovery of arrears of rent.

Unnian v. *Rámá* 415

4. ———————*Karnavan, Decree against—Execution against tarwad property—Sale—Right of purchaser*—Res judicata—*Right of junior member of tarwad not impleaded to contest sales of tarwad property in execution of decree against karnavan sued as such:*

When the karnavan of a Malabar tarwad has not been impleaded as such in a suit, and there is nothing on the face of the proceedings to show that it was intended to implead him in his representative character, tarwad property cannot be attached and sold in execution of the decree, even though it is proved that the decree was obtained for a debt binding on the tarwad. Although the property of a tarwad may be attached and sold in execution of a decree when the karnavan is sued as representative of the tarwad, members

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of the tarwad who are not parties to the proceedings and have not been represented in the manner prescribed by the Code of Civil Procedure are not estopped from showing that the debt for which the decree was passed was not binding on the tarwad.

Ittiachan v. *Velappan* 484

5. ——————*Karnavan—Powers restricted by family arrangement—Redemption of kánam—Repayment of renewal fee, improperly re-received by karnavan—Amount to be ascertained before decree—Value of improvements to be ascertained before decree—Jenmi—Right to deduct arrears of rent due from sum payable:*

The ordinary powers of the karnavan of a Malabar tarwad can be restricted by a family agreement to which he is a party, and if in breach of such agreement, the karnavan makes an alienation to a stranger who has notice of the agreement, the tarwad is not bound by the alienation. When a decree is passed for recovery of land demised on kánam on payment of the amount received as renewal fee, the amount must be ascertained at the trial and inserted in the decree. On taking an account between the jenmi (mortgagor) and kánam-holder (mortgagee), the former, on redemption, has by custom a right to deduct all arrears of rent due to him from the sum which he has to pay to the latter, before recovering possession of the land.

Kanna Pishárodi v. *Kombi Achen* 381

MAPILLAS—*Adoption of Hindú law—Presumption as to joint property:*

Although Mapillas in Malabar ordinarily follow the Hindú custom of holding family property undivided, yet, as they are not subject to the same personal law as the Hindús, their claims cannot be governed by the legal presumption of joint ownership.

Ammutti v. *Kunji Keyi* 452

MARRIAGE—*Custom:*

See HINDÚ LAW, 6.

2. ——————*Divorce—Change of religion:*

See HINDÚ LAW, 8.

MERGER:

See MORTGAGE, 4.

MISJOINDER:

See CIVIL PROCEDURE CODE, 9.

MORTGAGE:

See STAMP ACT, 7.

2. —————— *Conditional Sale:*

See REGULATION XXXIV OF 1802.

3. —————— *Decree:*

See HINDÚ LAW, 10.

4. —————— *Decree for redemption— Second suit to redeem—Civil Procedure Code, ss. 13, 244:*

A decree obtained by a mortgagor, which declared that the mortgagee should deliver up possession on payment of the sum found due to him, not having been executed for three years, a purchaser of the equity of redemption sued the mortgagee to redeem:—*Held*, that this suit was not barred by the former decree and that the plaintiff was entitled to redeem. *Sámi* v. *Sómasundram* (I.L.R., 6 Mad., 119) approved. *Gán Sávant Bál Sávant* v. *Náráyan Dhond Sávant* (I.L.R., 7 Bom., 467) dissented from.

Karuthasámi v. *Jaganátha* 478

5. —————— *First mortgage paid off by third mortgagee in ignorance of second mortgage—Registration—Notice—Intention to keep alive first mortgage presumed:*

S mortgaged land to P. G subsequently obtained a decree, by consent, against S creating a charge on the same, and other, land and registered the

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decree. A, in ignorance of G's decree, paid off P's mortgage, but took no assignment thereof, and took a mortgage from S of all the land covered by G's decree. In a suit by G against S and A to enforce payment of his mortgage debt:—*Held*, that, A, not having had notice of G's decree, was entitled to stand as first incumbrancer in respect of the money paid to discharge P's mortgage, and that, even if registration was legal notice, an intention to keep alive P's mortgage was to be presumed in favor of A, in accordance with the ruling of the Privy Council in *Gokul Doss Gopal Doss* v. *Rámbux Seochand* (L.R., 11, I.A. 126).

Gangádhara v. *Sivarámá* 246

6. ——— *Pledge of mortgage bond—Fraudulent sale by mortgagor—Suit to enforce mortgage against* bonâ fide *purchaser:*

A prior encumbrancer will not be postponed to a subsequent encumbrancer, unless he has been guilty of gross negligence. A mortgaged land to B. B having brought certain land from C pledged his mortgage-deed to C to secure the unpaid purchase money. C gave the bond to A who was his brother-in-law. A representing to D that the mortgage was redeemed, sold the land to him giving him the bond as a title-deed. In a suit by B against D to recover the mortgage amount by sale of the land:—*Held*, that D, even although a *bonâ fide* purchaser, could not resist the claim.

Mutha v. *Sámi* 200

7. ——— *Redemption—Cost of suit:*

See MALABAR LAW.

8. ——— *Redemption on terms of admitted demise:*

See MALABAR LAW, 3.

NEGLIGENCE—GROSS:

See MORTGAGE, 6.

NOTICE—*Fraud:*

See REGISTRATION ACT, 2.

2. ——— *Registration:*

See MORTGAGE, 5.

3. ——— **TO QUIT:**

See LANDLORD AND TENANT, 1.

OBJECTIONS TO DECREE—*In formâ pauperis* 214

OFFICIAL ASSIGNEE—*Commission:*

See INSOLVENCY ACT, 2.

ONUS PROBANDI:

See TOWNS' IMPROVEMENT ACT, 2.

See CIVIL PROCEDURE CODE, 13.

PARENT AND CHILD:

See HINDÚ LAW, 11.

PARTITION SUIT—*Subject-matter—Jurisdiction:*

See CIVIL COURTS ACT, 2.

2. ———

See HINDÚ LAW, 13.

PAUPER APPEAL:

See CIVIL PROCEDURE CODE, 37.

2. ——— *Objections to decree on appeal* 214

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PENAL CODE, ss. 190, 503, 508—*Intimidation—Excommunication by Roman Catholic priest—Criminal proceedings stayed until complainant established the illegality of the priest's acts in a Civil Court :*

Where the exercise of ecclesiastical jurisdiction is plainly *ultrà vires*, or otherwise unsanctioned by the ordinances of a religious society, or where such ordinances controvert the general law, and, in either case, consequences result which the criminal law was intended to restrain, the Criminal Courts are not at liberty to decline jurisdiction. A Roman Catholic complained to a Magistrate that he had been threatened with an illegal sentence of excommunication and had been excommunicated by the ecclesiastical authorities, with a view to prevent him from asserting his legal rights in defending a civil suit concerning the property of a church :—*Held*, that, under the circumstances, the proper course was for the Magistrate to postpone the trial till the complainant proved in a Civil Court the illegality of the action of the ecclesiastical authorities.

In re *DeCruz* 140

2. ————, s. 286—*Probable danger to human life—Loaded gun left in open place :*

C having returned to his house after dawn from watching his crops at night with a loaded gun, and finding his house-door locked, placed the gun, loaded, with the hammer down on the cap, on a cot outside his house and went for a short time to a neighbouring house. A, the child of a neighbour, four year's old, was killed by the gun exploding. C was convicted under section 286 of the Penal Code for negligently omitting to take order with the gun sufficient to guard against probable danger to human life :—*Held*, that the conviction was bad in law.

Queen-Empress v. *Chenchugadu* 421

3. ————, s. 309—*Attempt to commit suicide—Intention*—Locus pœnitentiæ *:*

R, with the intention of committing suicide by throwing herself into a well, ran to the well, where she was arrested. She was convicted under section 309 of the Indian Penal Code of having attempted to commit suicide :—*Held*, that the conviction was illegal.

Queen-Empress v. *Ramakka* 5

PLAINT AMENDMENT :

See Civil Procedure Code, 9.

2. ————PRESENTATION :

See Rent Recovery Act, 11.

3. ———— RETURNED :

See Civil Procedure Code, 14.

PRESCRIPTION :

See Fishery.

PRESUMPTION—Stridhanam :

See Hindú Law, 13.

PROMISSORY NOTE :

See Stamp Act, 5.

PURCHASER, BONA FIDE—*Fraudulent Sale :*

See Mortgage, 6.

RECEIPT :

See Stamp Act, 4.

RECEIVER—*Appointment after decree :*

See Civil Procedure Code, 34.

2. ————*Power of :*

See Civil Procedure Code, 33.

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REGISTRATION ACT, s. 17—*Unregistered conveyance—Covenant to pay money contingent on ejectment—Suit for money dismissed:*

By an unregistered document A stipulated that B should enjoy certain land for a term of years in order that a debt and interest might be liquidated by receipt of profits, estimated at a fixed sum, and it was provided that, if B's possession was disturbed in the meantime, A should pay the balance of the principal then due and interest from the date of the loan. B having been ejected, sued A upon the covenant to pay:—*Held*, that as the covenant to pay depended on the principal contract, which could not be proved for want of registration, B could not recover.

Venkatrayudu v. *Papi* 182

2. ——————, ss. 49, 50—*Notice—Fraud—Optionally registrable sale deed, unregistered, competing with similar deed registered:*

R sold land to S in 1873 for Rs. 54 and put S in possession. In 1879 R sold the same land to N for Rs. 24-8-0. N registered his sale-deed. The sale-deed of S was not registered. In 1879 S sued N to have N's sale-deed cancelled on the ground of fraud. The Lower Courts held that N's sale-deed was executed collusively and fraudulently and decreed the claim:—*Held*, on second appeal, that as there were grounds, apart from notice and knowledge of possession, for holding N's sale-deed to have been executed collusively, the decision was correct.

Nárasimulu v. *Somanna* 167

3. —————— *Notice:*

See MORTGAGE 246

REGULATION, XXV, 1802.

2. ———— **XXXIV OF 1802**—*Mortgage by way of conditional sale—Muhammadan mortgagor:*

In 1832 a Muhammadan mortgaged certain land with possession on condition that if the money lent was not repaid within eight years, the land should be enjoyed by the mortgagee after that period as if conveyed by sale. In 1883 a suit was brought to redeem:—*Held*, that the title of the mortgage became absolute by virtue of the terms of the contract on default of payment within the time specified. The obligation cast by Regulation XXXIV of 1802 upon a mortgagee to account for profits does not prevent a mortgage by way of conditional sale from becoming, after the period for redemption has elapsed, an absolute sale where no account has been rendered by the mortgagee. The rule laid down in *Pattabhiramier's case* (13 M.I.A., 560) applied to a mortgage executed by a Muhammadan.

Mallikarjunudu v. *Mallikarjunudu* 185

3. ———— **V of 1804** 525

4. ———— **I of 1805** 343

5. ———— **IV of 1816**—*Village Múnsif—Jurisdiction—Power to transfer suit:*

In a suit under Regulation IV of 1816 the defendant having objected to the Village Múnsif trying the suit on the ground of personal hostility, the Múnsif transferred the suit to another Village Múnsif:—*Held*, that this transfer was illegal. Per Hutchins, J.—*Semble*:—In such a case the Village Múnsif should report the facts to the District Court, and the District Judge should transfer the case for trial to another Village Múnsif.

Lakshmakká v. *Báli* 500

6. ———— **VII of 1816** 569

7. ———— **XII of 1816**—*District panchâyat—Regulation VII of 1816—Act III of 1873:*

Neither the total repeal of Regulation VII of 1816 by Act III of 1873 (Madras Civil Courts Act) nor the partial repeal of Regulation XII of 1816, so far as it contained words of reference to Regulation VII of 1816, abolished the jurisdiction of district panchâyats. A Collector cannot order a reference

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to a district pancháyat under Regulation XII of 1816 unless there has been (1) an inquiry as to whether the parties will submit to the jurisdiction of a village pancháyat; (2) an objection from either party to such reference, and a request in writing by one of the parties that the matter be referred to a district pancháyat.

Chikati Zamíndár v. *Peddakimedi Zamíndár* 569

8. ———— II of 1818 347

9. ————VI of 1831:

See HEREDITARY VILLAGE OFFICE.

RELIGION—*Change of:*

See HINDÚ LAW 169

RENT RECOVERY ACT, s. 1—*Inámdár—Regulation XXV of* 1802:

Section 1 of Madras Act VIII of 1865 does not confine the term inámdár to such inámdárs as are registered:—*Held*, therefore, that the purchaser of an inám village, who had not got his name registered as inámdár, was not thereby debarred from enforcing the provisions of the Act against a tenant for arrears of rent. *Valamarámá* v. *Vírappa* (I.L.R., 5 Mad., 145) observed upon.

Subbu v. *Vasanthappan* 351

2. ————————, ss. 1, 2—*Landholder—Distraint:*

V leased certain fields to S at a single rent. Of these fields, some were held by V under a raiyatwári pattá, but the pattá for the rest stood in the names of V's vendors. V distrained for arrears of rent under the provisions of the Rent Recovery Act:—*Held*, that V was not a landholder within the definition in the said Act in respect of the latter fields, and, therefore, that the distraint was illegal.

Subba v. *Venkata* 9

3. ————————, ss. 1, 79—*Landholder—Assignee—Delegation of powers:*

The interest of B in the form of a jágír, which he had obtained on lease from the jágírdár, was sold in execution of a decree and purchased by J, who assigned his interest to the plaintiff. In a suit under Act VIII of 1865 (Madras) by plaintiff to compel defendant to accept a pattá, defendant objected that plaintiff had no right to enforce acceptance of a pattá under the Act:—*Held*, by the Full Bench (Turner, C.J., Muttusámi Ayyar, Hutchins, and Brandt, JJ.; Kernan, J. dissenting) that plaintiff was a landholder within the meaning of the Act and entitled to enforce acceptance of a pattá—*Zinulabdin Rowten* v. *Vijien Virapatren* (I.L.R., 1 Mad., 49) dissented from.

Gouse v. *Sundara* 394

4. ————————, s. 2—*Tenant—Lessee of zamíndár—Limitation:*

In 1869 a village in the zamíndári of R was granted by the zamíndár to S at a favorable rent, in consideration of S renouncing a claim to the zamíndári. The village was not separately assessed and divided off from the zamíndári. The rent having fallen into arrears, the village was sold in 1875 under the provisions of the Rent Recovery Act and purchased at the sale by the Agent of the Court of Wards on behalf of the defendants, minor sons of the deceased zamíndár. In a suit brought by S, in 1883, to recover the village:—*Held*, that the sale was binding on S and that the suit was barred by limitation.

Baskárasámi v. *Sivasámi* 196

5. ————————, ss. 3, 4, 9—*Landlord and tenant—Right to enforce acceptance of pattá:*

The renter of a zamíndári, to whom the right to collect the kattubadi or quit-rent on inám lands and the road-cess payable to Government was delegated, sued to compel the inámdárs to accept pattás and execute muchalkás for the amounts due:—*Held*, that the inámdárs, not being cultivating tenants, were not bound, under Act VIII of 1865 (Madras), to accept a pattá—*Rámásámi* v. *The Collector of Madura* (I.L.R., 2 Mad., 67) referred to.

Rámá v. *Venkatáchalam* 576

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6. ——————, s. 7—*Tender of pattá:*

When a Collector in a suit brought under the provisions of the Rent Recovery Act has decided that a tenant is to accept a pattá on certain terms, the landholder is not bound to tender such pattá for acceptance before suing to enforce the terms thereof.

Court of Wards v. *Darmalinga* 2

7. ——————, ss. 7, 9—*Demand of pattá:*

The Rent Recovery Act does not require that a tenant demanding a pattá shall apply in writing to the landholder specifying the lands and the fasli for which the pattá is required.

Strinivasa v. *Náráyanasámi* 1

8. ——————, s. 11—*Implied contract:*

Where a landlord, having for many years accepted rent at "dry" rates from a tenant for certain land, sued the tenant to enforce acceptance of a pattá at "garden" rates on the ground that the tenant had raised a crop with water taken from a well constructed by the tenant:—*Held*, that there was an implied contract within the meaning of Section 11 of the Rent Recovery Act to accept rent at "dry" rates, and that plaintiff was, therefore, not entitled to enhance the rate of rent, the improvement having been effected at the expense of the tenant.

Krishna v. *Venkatasámi* 164

9. ——————, s. 38—*Sale—Adjournment for want of bidders to next day, invalid—Duty of officer conducting to sale:*

A sale of land for arrears of rent under the provisions of the Rent Recovery Act having been advertised for a certain day, was, owing to the absence of bidders on that day, adjourned and held on the day following by the officer empower to sell:—*Held*, that the sale was invalid.

Palani v. *Sivalinga* 6

10. ——————, s. 38—*Civil Procedure Code, ss.* 276, 295—*Sale of tenant's interest by landlord pending attachment by Civil Court:*

The interest of a tenant in certain land having been attached by his creditor in execution of a decree for money, the landlord attached the same land for arrears of rent, brought it to sale, and purchased it under the provisions of the Rent Recovery Act. The creditor subsequently purchased the interest of the tenant, which was sold in execution of his decree. In a suit by the landlord to have the sale to the creditor declared invalid:—*Held*, that the landlord's purchase was subject to the creditor's attachment.

Subramanya v. *Rájarám* 578

11. ——————, s. 51—*Presentation of plaint—Acceptance by Court of plaint sent by post:*

K sent a plaint by post to a Revenue officer, who was on tour and, in obedience to an order issued by such officer to pay batta within a certain date, presented himself and paid the amount demanded within thirty days from the date of the cause of action:—*Held*, that the suit was instituted within the time prescribed by section 51 of the Rent Recovery Act—*Moparti Pitchi Naidu* v. *Vuppala Kondamma* (6 M.H.C.R., 136) approved and distinguished.

Sankaranáráyana v. *Kunjappa* 411

RES JUDICATA:

See Civil Procedure Code, 4, 7, 8.

2. ——————

See Malabar Law, 4.

3. ——————

See Mortgage, 4.

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4 ————

It is by the decree and not by the judgment that a question of *res judicata* must be decided. In 1881 A sued K and others claiming a declaration of his title to certain land and an injunction against interference with his possession. K claimed part of the land by purchase from M. The Múnsif decreed for A and this decree was confirmed on appeal by the District Judge, but in his judgment the District Judge recorded that K's claim was not adjudicated upon and that he should bring a fresh suit if he had any claim. In 1883 K sued A to recover the land, which he claimed by purchase from M. A pleaded that the claim was *res judicata* by virtue of the decree in the former suit. The District Múnsif and, on appeal, the District Judge held that the claim was not *res judicata* and decreed for K:—*Held*, on appeal to the High Court, that as no reservation was made in the decree of K's right to bring another suit, the plea of *res judicata* was good, but that, under the circumstances, an opportunity should be given to K to apply to the District Court to have the decree in the former suit brought into conformity with the judgment. This having been done, the decree of the lower Courts was confirmed.

Avála v. *Kuppu* 77

5. ————*Civil Procedure Code, s.* 13—*Decree of competent Court:*

In 1875, P sued in a Múnsif's Court to eject a tenant from a house and to recover arrears of rent. S intervened and claimed the house under a deed of gift. The value of the property comprised in the deed of gift exceeded the limit of the pecuniary jurisdiction of the Múnsif's Court. The suit was dismissed. But on appeal the claim of S under the deed of gift was adjudicated upon and rejected, and P obtained a decree for the land. In 1882, S sued P to recover all the property comprised in the deed of gift:—*Held*, that, S was estopped by the decree in the former suit from claiming the house. It was contended by P that the deed of gift was invalid. *Held*, that as to validity of the deed of gift, the decree of the Múnsif's Court was not the decree of a competent Court within the meaning of Section 13 of the Code of Civil Procedure, 1882, and, therefore, that S was not estopped from showing that the deed was valid, and claiming the rest of the property comprised therein.

Pathuma v. *Salimamma* 83

RESIDENCE—*Arrest before Judgment:*

See CIVIL PROCEDURE CODE, 39.

RESUMPTION:

See LANDLORD AND TENANT, 1.

REVENUE RECOVERY ACT, ss. 2, 25, 37—*Sale for arrears of revenue—Liability of all fields included in pattá:*

By accepting a raiyatwárí pattá, the landholder pledges each and every field included therein as security for the whole assessment. Several fields separately assessed to revenue were held under one pattá by K. Default having been made by K in payment of revenue, one of such fields, of which N was the owner, was attached under the Revenue Recovery Act. N claimed to have it released from attachment on payment of the assessment due upon it. The claim was rejected and the field sold:—*Held*, in a suit by N to set aside the sale, that the sale was valid.

Secretary of State for India v. *Náraydnan* 130

SALT LAWS AMENDMENT ACT, 1882, s. 26, cl. 3; s. 27 (b)—*Salt imported from Foreign State, contraband:*

Section 26 of the Salt Laws Amendment Act (Madras Act I of 1882) makes it penal to import salt by any route not legally sanctioned for that purpose, and also to possess salt known to have been imported in contravention of the Salt Laws, and section 27 of the said Act authorizes, *inter alia*, the Governor in Council to make rules for regulating the import of salt by land. No such rules having been passed in 1884, P was convicted of being in possession of salt known to have been manufactured in, and imported from, the Native State of Pudukottai:—*Held*, that the conviction was right.

Queen-Empress v. *Podiathál* 342

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SERVICE TENURE:

See LANDLORD AND TENANT, 1.

SETTLEMENT—*Stamp duty:*

See STAMP ACT, 8.

SLANDER—*Cause of action:*

See DEFAMATION.

SMALL CAUSE COURT—*Act XI of 1865—Jurisdiction—Water-cess—Payment by landholder—Implied contract by tenant to recoup:*

If a landholder pays to Government water-cess which his tenant is legally bound to pay, a Small Cause Court constituted under Act XI of 1865 has jurisdiction to decide a suit brought by the landholder against the tenant to recover the amount so paid by the landholder.

Venkatramaya v. *Viraya* 4

2. ———————————, *s.* 20—*Civil Procedure Code, s.* 223—*Small-cause decree of Subordinate Judge—Execution against immovable property—Co-ordinate jurisdiction of Subordinate Judge and District Múnsif—Execution by District Múnsif:*

The Court of a Subordinate Judge and that of a District Múnsif had jurisdiction over certain immovable property. A small-cause decree of the former Court having been sent by the Subordinate Judge to the Court of the District Múnsif for execution against the said property under the provisions of Section 20 of Act XI of 1865, the application for execution was rejected by the Múnsif on the ground that this procedure was illegal:—*Held*, that section 20 of Act XI of 1865 was not modified by section 223 of the Code of Civil Procedure, and that the Múnsif's Court was, therefore, bound to execute the decree.

Kahánarámá v. *Ranga* 8

SPECIFIC RELIEF ACT, s. 42:

See JURISDICTION, 4.

2. ———————————

See CIVIL PROCEDURE CODE, 9.

STAMP ACT, s. 3(10)—*Unduly stamped—Rule* 5 (e) *of the Government of India, 3rd March* 1882 (*attestations of plain sheets subjoined to stamped documents*), **ultrà vires:**

Of the rules, dated 3rd March 1882, issued by the Governor-General in Council, under sections 9, 15, 17, 32, 51 and 56 of the Indian Stamp Act, 1879, rule 5 (*e*) requires that the part of an instrument which is written on plain sheets of paper attached to the stamped paper must be attested by the parties executing, and by the witnesses to, the document:—*Held*, by Kernan, Muttusámi Ayyar, and Brandt, JJ. (Turner, C.J., dissenting), that the rule is *ultrà vires* and inoperative for the purpose of declaring an instrument, written contrary to the provisions thereof, unduly stamped within the meaning of section 3 (10) of the Act. *Per* Turner, C.J.—An instrument not written in accordance with the directions in rule (*e*) is not duly stamped.

Reference under Stamp Act, s. 46 532

2. ————, **s. 4 (c), sch. I, art. 5**—*Court Fees Act, Schedule II, Art.* 1(*b*)—*Petition to withdraw suit—Agreement—Bond:*

A petition, stamped as an agreement, having been presented to a District Court by the parties to a suit, informing the Court that they had entered into an agreement, whereby, *inter alia*, the defendant was bound to deliver to the plaintiff certain wood, and requesting that the suit might be removed from the file, the District Judge impounded it, levied a sum for insufficient stamp-duty and a penalty, on the ground that it was a bond, and forwarded it to the Collector. Upon a reference made by the Board of Revenue at the

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instance of the Collector:—*Held*, that the duty leviable was a Court fee stamp under article 1 (*b*) of schedule II of the Court Fees Act, 1870.

Reference under Stamp Act, *s.* 46 15

3. ————, ss. 34, 50:

Where a document has been admitted in evidence as duly stamped, such admission can only be called in question by the Appellate Court under section 50 of the Indian Stamp Act.

Reference under Stamp Act, *s.* 46 564

4. ————, ss. 61, 64—*Receipt—Acknowledgment by letter*:

Where the receipt of money exceeding 20 rupees, in satisfaction of a debt, is acknowledged by letter without a receipt stamp being affixed, the writer is liable to punishment under section 61 of the Indian Stamp Act, 1879.

Reference under Stamp Act, *s.* 46 11

5. ————, sch. I, art. 11—*Promissory note—Bond—Impressed label—Impressed sheet—Rule* 9(*a*) *of the Rules of Government of India of* 26*th February* 1881:

By a document, dated 8th March 1882, which purported to be a promissory note attested by three witnesses and written on an impressed label of two annas, A promised to pay B before a certain date Rs. 135:—*Held*, that the document was a bond and must be treated as unstamped for the purposes of Section 34 of the Indian Stamp Act, 1879. By a document, dated 23rd June 1880, stamped with an adhesive stamp of one anna, purporting to be a promissory note attested by two witnesses, A promised to pay Rs. 56 to B or order, on demand:—*Held*, that the document was not a bond but a promissory note.

Reference under Stamp Act, *s.* 46 87

6. ————, sch. I, art. 27; sch. II, art. 11(a)—*Vakil—Entry on roll of advocates—Exemption from duty*:

By article 11(*a*) of schedule II of the Indian Stamp Act, 1879 (which exempts from duty the entry of an advocate, vakíl or attorney on the roll of any High Court when he has previously been enrolled in a High Court established by royal charter), a vakíl on the roll of the High Court, Madras, who applies to be entered on the roll of advocates, is exempted from the duty prescribed by article 27 of schedule I of the said Act.

In re *Parthasáradi* 14

7. ————, sch. I, art. 44 (b)—*S.* 3 (13), *sch. I*, *art.* 29; *art.* 5(*c*)—*Mortgage—Assignment of growing coffee*:

By an agreement made the first day of September 1884, A, in consideration of Rs. 1,000 to be advanced to him by B, assigned to B the whole crop of coffee then growing upon a certain estate upon trust, *inter alia*, to secure the repayment of the sum advanced. It was stipulated that A should cultivate the crop till maturity and deliver it to B:—*Held*, that this document was a mortgage liable to duty under article 44 (*b*) of schedule I of the Indian Stamp Act, 1879.

Reference under Stamp Act, *s.* 46 104

8. ————, sch. I, art. 57—*Settlement—Stamp duty*:

Under article 57 of schedule I of the Indian Stamp Act, 1879, stamp duty on a settlement is to be calculated on the value of the property settled as set forth in such settlement:—*Held*, that these terms do not mean the value of the enterest or interests created by the settlement, but refer to the value of the property settled, which, it was intended by Legislature, should be set forth in the settlement.

Reference under Stamp Act, *s.* 46 453

STATUTES.

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39 & 40 Geo. III, c. 79, s. 3 24

4 Geo. IV, c. 71, s. 17 24

11 & 12, Vict. c. 21 24

See INSOLVENCY ACT.

See CIVIL PROCEDURE CODE, 29.

44 & 45, Vict. c. 58, s. 145.

See ARMY ACT.

STEPMOTHER:

See HINDÚ LAW, 3, 4.

STREET:

See TOWNS' IMPROVEMENT ACT, 2.

STRIDHANAM—*Presumption*:

See HINDÚ LAW, 13.

SUDRA—*Illegitimate son—Maintenance*:

See HINDÚ LAW, 16.

TIDAL RIVER:

See FISHERY.

TOWNS' IMPROVEMENT ACT, 1871, ss. 64, 72—*Tax on animals, License, Extent and limit of*:

N having taken out a license under the provisions of the Towns' Improvement Act, 1871, for a bullock, the bullock died and N bought another bullock, but did not take out a second license. N was convicted for keeping this bullock without a license:—*Held* (by Turner, C.J., and Hutchins, J.) Brandt, J. dissenting) that the conviction was right.

Municipal Commissioners of Mannárgudi v. *Nallapa* 327

2. ———————————, ss. 138, 139—*Street—Encroachment—Possession—Private property—Onus* probandi:

H owned a house in the town of A, to which the Towns' Improvement Act, 1871, was extended in 1879. In 1882 the Municipal Commissioners, professing to act under section 139 of the said Act, removed a pial which projected beyond the main walls of H's house and abutted on a lane which was used by the public. H proved that the pial had existed for fifty years:—*Held*, that the action of the Municipal Commissioners was illegal.

Hanumayya v. *Roupell* 64

TRADE-MARK—*User in foreign market—Abandonment—Estoppel by conduct*:

Such possession and use of a trade-mark in one market as to constitute a right in it, establishes in the owner thereof an exclusive right to that trade-mark in other markets, although the owner may not have used it in such markets. To constitute a mark a trade-mark it must have been adopted as a symbol devised to distinguish a particular class of goods as the goods of that class manufactured or selected by a particular manufacturer or merchant. Where the plaintiffs by their conduct led the defendant to believe that they claimed no right to a certain trade-mark, and that it was open to the defendant to adopt it as his own, and the defendant did adopt it, and by his industry secured a wide popularity for it in the Indian market:—*Held*, that the plaintiffs were estopped from denying the defendant's right to use the trade-mark in the Indian market.

Lavergne v. *Hooper* 149

UNBORN SON—*Right to ancestral property not defeated by will of father*:

See HINDÚ LAW, 5.

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VAKIL—*Entry on roll of advocates—Stamp duty:*
See STAMP ACT, 6.

VILLAGE MUNSIF—*Jurisdiction:*
See REGULATION IV OF 1816.

WATER-CESS:
See SMALL CAUSE COURT, 1.

WIDOW—*Alienation by:*
See HINDÚ LAW, 18, 19, 20.

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